No. 17-765	
Title:	**United States, Petitioner** **v.** **Victor J. Stitt, II**
Docketed:	November 24, 2017
Linked with 17A287	
Lower Ct:	United States Court of Appeals for the Sixth Circuit
Case Numbers:	(14-6158)
Decision Date:	June 27, 2017
Questions Presented	

DATE	PROCEEDINGS AND ORDERS
Sep 12 2017	Application (17A287) to extend the time to file a petition for a writ of certiorari from September 25, 2017 to October 25, 2017, submitted to Justice Kagan.
Sep 13 2017	Application (17A287) granted by Justice Kagan extending the time to file until October 25, 2017.
Oct 13 2017	Application (17A287) granted by Justice Kagan extending the time to file until November 24, 2017.
Oct 13 2017	Application (17A287) to extend further the time from October 25, 2017 to November 24, 2017, submitted to Justice Kagan.
Nov 21 2017	Petition for a writ of certiorari filed. (Response due December 26, 2017) **Petition** **Proof of Service**
Dec 14 2017	Motion to extend the time to file a response from December 26, 2017 to January 25, 2018, submitted to The Clerk. **Main Document**
Dec 19 2017	Motion to extend the time to file a response is granted and the time is extended to and including January 25, 2018.
Jan 25 2018	Motion for leave to proceed in forma pauperis filed by respondent Victor Stitt, II. **Main Document**
Jan 25 2018	Brief of respondent Victor Stitt, II in opposition filed.

	Main Document **Proof of Service**
Feb 13 2018	Reply of petitioner United States filed. **Proof of Service** **Main Document**
Feb 14 2018	DISTRIBUTED for Conference of 3/2/2018.
Feb 23 2018	Letter of petitioner United States filed. (Distributed) **Main Document**
Feb 26 2018	Rescheduled.
Mar 21 2018	DISTRIBUTED for Conference of 4/13/2018.
Apr 16 2018	DISTRIBUTED for Conference of 4/20/2018.
Apr 23 2018	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
Apr 23 2018	Petition GRANTED. The petition for a writ of certiorari in No. 17-766 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Apr 23 2018	Because the Court has consolidated these cases for briefing and oral argument, future filings and activity in the cases will now be reflected on the docket of No. 17-765. Subsequent filings in these cases must therefore be submitted through the electronic filing system in No. 17-765. Each document submitted in connection with one or more of these cases must include on its cover the case number and caption for each case in which the filing is intended to be submitted. Where a filing is submitted in fewer than all of the cases, the docket entry will reflect the case number(s) in which the filings is submitted; a document filed in all of the consolidated cases will be noted as "VIDED."
May 07 2018	Motion for appointment of counsel filed by respondent Jason Sims (in No. 17-766). (Corrected motion to be submitted 5/29/18).
May 07 2018	Motion for appointment of counsel filed by respondent Jason Daniel Sims (in No. 17-766). (Corrected motion received 6/4/18). **Main Document** **Proof of Service**
May 09 2018	Motion for an extension of time filed. **Main Document**
May 17 2018	Motion to extend the time to file the opening briefs on the merits granted. The time to file the joint appendix and petitioner's brief on the merits is extended to an including June 26, 2018. The time to file respondents' briefs on the merits is extended to and including August 14, 2018.

May 31 2018	Motion to dispense with printing the joint appendix filed by petitioner United States. VIDED. **Proof of Service** **Main Document**
Jun 13 2018	DISTRIBUTED for Conference of 9/24/2018.
Jun 26 2018	Brief of petitioner United States filed. VIDED. **Certificate of Word Count** **Main Document**
Jul 09 2018	SET FOR ARGUMENT On Tuesday, October 9, 2018. VIDED.
Aug 03 2018	CIRCULATED
Aug 06 2018	Motion to dispense with printing the joint appendix filed by petitioner GRANTED. VIDED.
Aug 07 2018	Record requested from the U.S.C.A. 6th Circuit.
Aug 07 2018	Record received from the U.S.C.A. 6 Circuit. The record is electronic.
Aug 14 2018	Brief of respondent Victor Stitt, II filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 14 2018	Blanket Consent filed by Respondent, Jason Daniel Sims **Blanket Consent**
Aug 14 2018	Brief of respondent Jason Daniel Sims (in 17-766) filed. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 15 2018	Blanket Consent filed by Respondent, Victor Stitt, II **Blanket Consent**
Aug 16 2018	Joint motion for divided argument filed by respondents. VIDED. **Main Document** **Proof of Service**
Aug 21 2018	Brief amicus curiae of The National Association of Criminal Defense Lawyers filed. VIDED. (Distributed) **Main Document** **Certificate of Word Count** **Proof of Service**
Aug 21 2018	Amicus brief of The National Association of Federal Defenders not accepted for filing. (Brief to be reprinted - August 24, 2018)
Aug 21 2018	Brief amicus curiae of National Association of Federal Defenders filed. VIDED. (Distributed)

	Main Document **Other** **Proof of Service** **Certificate of Word Count**
Sep 13 2018	Reply of petitioner United States filed. VIDED. (Distributed) **Proof of Service** **Main Document**
Sep 24 2018	Joint motion for divided argument filed by respondents DENIED.
Sep 24 2018	Motion to appoint counsel filed by respondent Jason D. Sims GRANTED, and Jeffrey L. Fisher, of Stanford, California, is appointed to serve as counsel for respondent in No. 17-766.
Sep 26 2018	Record received from the U.S.D.C. Eastern Dist. of Tennessee is electronic and located on PACER with the exception of SEALED documents that are electronic.
Oct 04 2018	Letter of respondent filed. (Distributed) **Main Document**
Oct 09 2018	Argued. For petitioner: Erica Ross, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondents: Jeffrey L. Fisher, Menlo Park, Cal. (Appointed by this Court.) VIDED.
Dec 10 2018	Judgment REVERSED. Breyer, J., delivered the **opinion** for a unanimous Court.

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR J. STITT, II

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR J. STITT, II

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App., *infra*, 1a-55a) is reported at 860 F.3d 854. The opinion of the court of appeals panel (App., *infra*, 56a-64a) is not published in the Federal Reporter but is reprinted at 637 Fed. Appx. 927.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 2017. On September 13, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 25, 2017. On October 13, 2017, Justice Kagan further extended the time to and including November 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 65a-80a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, respondent was convicted of unlawful possession of a firearm after a previous felony conviction, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 290 months of imprisonment, to be followed by four years of supervised release. Judgment 1-3. A panel of the court of appeals affirmed, but the en banc court vacated that decision and remanded for resentencing. App., *infra*, 1a-64a.

1. Under 18 U.S.C. 924(a)(2), the default term of imprisonment for the offense of unlawful possession of a firearm after a previous felony conviction is zero to 120 months. The Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(1), increases that penalty to a term of 15 years to life if the defendant has "three previous convictions * * * for a violent felony or a serious drug offense." The ACCA defines a "violent felony" to include, *inter alia*, any crime punishable by more than one year that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. 924(e)(2)(B)(ii). Although the ACCA does not define "burglary," this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), construed the term to include "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

Taylor instructed courts to employ a "categorical approach" to determine whether a prior conviction meets

that definition. 495 U.S. at 600. Under that approach, courts examine "the statutory definition[]" of the previous crime in order to determine whether the jury's finding of guilt, or the defendant's plea, necessarily reflects conduct that constitutes the "generic" form of burglary referenced in the ACCA. *Ibid.* If the statute of conviction consists of elements that are the same as, or narrower than, generic burglary, the prior offense categorically qualifies as a predicate conviction under the ACCA. But if the statute of conviction is broader than the ACCA definition, the defendant's prior conviction does not qualify as ACCA burglary unless (1) the statute is "divisible" into multiple crimes with different elements, and (2) the government can show (using a limited set of record documents) that the jury necessarily found, or the defendant necessarily admitted, the elements of generic burglary. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016); *Descamps* v. *United States*, 133 S. Ct. 2276, 2284 (2013); *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

2. In 2011, during an argument with his girlfriend, respondent "tried to shove a loaded handgun into [her] mouth while threatening to kill her." App., *infra*, 2a. A neighbor called the police, and respondent fled to his mother's home. *Ibid.* Law enforcement officers followed respondent, who surrendered to the authorities after a brief foot chase. *Ibid.*; see *id.* at 57a. Detectives recovered a .22 caliber handgun within arm's reach of respondent. *Id.* at 57a; see *id.* at 2a.

A federal grand jury indicted respondent on one count of unlawfully possessing a firearm after a prior felony conviction, in violation of 18 U.S.C. 922(g)(1). A jury subsequently found respondent guilty of that crime. App., *infra*, 2a. At sentencing, the district court

determined that respondent had nine prior state convictions that qualified as "violent felonies" under the ACCA, including six prior convictions for aggravated burglary under Tennessee Code Annotated § 39-14-403 (1997). App., *infra*, 2a, 57a. That statute criminalizes the burglary of any "habitation," Tenn. Code Ann. § 39-14-403(a) (1997), defined as (A) "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons"; (B) any "self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant"; and (C) "each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle," Tenn. Code Ann. § 39-14-401(1) (Supp. 2001). The court applied the ACCA and sentenced respondent to 290 months of imprisonment. App., *infra*, 2a.

A panel of the court of appeals affirmed respondent's ACCA sentence. App., *infra*, 56a-64a. The government acknowledged that this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551 (2015), which held a separate portion of the ACCA's definition of "violent felony" to be unconstitutional, "invalidated the violent-felony status of three of [respondent's] prior offenses, leaving only his six aggravated-burglary convictions at issue." App., *infra*, 2a-3a. Relying on circuit precedent, the court of appeals held that a conviction under the Tennessee aggravated-burglary statute categorically qualifies as a conviction for generic burglary under the ACCA and that respondent was therefore properly sentenced as an armed career criminal. *Id.* at 64a (citing *United States* v. *Priddy*, 808 F.3d 676, 684 (6th Cir.

2015); *United States* v. *Nance*, 481 F.3d 882, 887 (6th Cir.), cert. denied, 552 U.S. 1052 (2007)).

3. The court of appeals granted respondent's petition for rehearing en banc. Over the dissent of six of the 15 judges who participated in the proceeding, the en banc majority overturned prior circuit law, concluded that the set of "habitation[s]" covered by the Tennessee aggravated-burglary statute extends beyond the "building[s] or other structure[s]" covered by generic burglary, and remanded for the imposition of a non-ACCA sentence. App., *infra*, 1a-55a.[1]

a. The en banc majority concluded that no nonpermanent or mobile structure of any sort, including the structures adapted for habitation that are protected by the Tennessee aggravated-burglary statute, can fit within *Taylor*'s reference to a "building or other structure," 495 U.S. 598. The majority reasoned that "[a]lthough the Court left 'building or other structure' undefined" in *Taylor*, "it has confirmed repeatedly that vehicles and movable enclosures (e.g., railroad cars,

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[1] In its briefing before the panel and its opposition to the petition for rehearing en banc, the government "acknowledge[d] that Tennessee's definition of habitation encompasses some burglary locations that may not be buildings or structures under *Taylor*," but argued that the definition is divisible and thus that the modified categorical approach applied. Gov't C.A. Br. 28 n.4; see Gov't Resp. to Pet. for Reh'g 4-5 (similar). After the court of appeals ordered supplemental briefing on divisibility in light of this Court's decision in *Mathis* v. *United States*, *supra*, see Order (June 1, 2016), the government reconsidered its position. In its supplemental brief, the government acknowledged that Tennessee's definition of "habitation" is indivisible under *Mathis*, but argued that the definition as a whole is encompassed within the locational element of generic burglary as described by *Taylor*. See Gov't C.A. Supp. Br. 6-25. The court of appeals treated that argument as having been fully preserved.

tents, and booths) fall outside the definitional sweep" of that phrase. App., *infra*, 4a; see *id.* at 4a-5a (citing *Mathis*, 136 S. Ct. at 2250; *Nijhawan* v. *Holder*, 557 U.S. 29, 35 (2009); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186-187 (2007); *Shepard*, 544 U.S. at 15-16; *Taylor*, 495 U.S. at 599)); see *id.* at 6a-7a. The majority stated that *Taylor*'s definition of generic burglary "emphasizes a place's form and nature—not its intended use or purpose," *id.* at 5a, and discounted the particular habitation-related limitations of the Tennessee statute.

The majority recognized that *Taylor* had described what "Congress meant by 'burglary'" as "the generic sense in which the term is now used in the criminal codes of most states." App., *infra*, 7a (quoting 495 U.S. at 598). And the majority took note of a multijurisdictional analysis submitted by the government for the purpose of illustrating that, when *Taylor* was decided, the "overwhelming majority of states included vehicles and moveable enclosures in their burglary statutes" and that "a little more than half the states' burglary statutes specifically 'covered movable structures adapted for specific purposes such as overnight accommodation, business, or education.'" *Id.* at 7a-8a. The majority also recognized that *Taylor* had likened the ACCA definition of burglary to the Model Penal Code's definition, which included occupied structures of the sort covered by the Tennessee law. *Id.* at 8a. But the majority nevertheless viewed *Taylor*'s "clear and unambiguous language" to "exclude[] *all* things mobile or transitory." *Ibid.*

b. Five judges joined one or both of two concurrences.

Judge Boggs authored a concurrence disagreeing with several points made by the dissent, namely, that

the ACCA definition of burglary is "broader" than the common-law definition, that the common-law definition applied to dwellings including vehicles adapted for overnight accommodation, and that burglary of a habitation "was a kind of burglary that the *Taylor* Court would have counted as a 'generic' ACCA burglary." App., *infra*, 16a-17a; see *id.* at 19a-26a. Judge Boggs recognized, however, that the majority's conclusion would (in conjunction with other ACCA decisions) lead to "bizarre results." *Id.* at 26a. He further noted that the courts of appeals disagree on the question whether statutes that protect nonpermanent structures adapted or used for overnight accommodation criminalize "generic burglary." *Id.* at 27a-29a. Judge Boggs therefore suggested that "perhaps the [Supreme] Court will soon clarify the question before us—a question that occupies a significant portion of the federal judiciary's docket." *Id.* at 29a.

Judge White joined Judge Boggs' concurrence, and also filed a separate concurring opinion arguing, in response to the dissent, that common-law burglary did not protect tents and vehicles. App., *infra*, 33a-43a. Judge White acknowledged, however, that "[w]hether Tennessee's aggravated-burglary offense and similarly-defined offenses fall within Congress's concept of generic burglary" is a "difficult" question with "[p]ersuasive arguments * * * on both sides." *Id.* at 43a. She also observed that the court of appeals' decision would produce "some puzzling results," but viewed the lower courts to be required to "accept" those results in the absence of intervention by this Court or Congress. *Id.* at 42a.

d. Judge Sutton, joined by five other judges, dissented. App., *infra*, 43a-55a. He reasoned that Tennessee's aggravated-burglary statute necessarily qualified as generic burglary, because generic burglary is an expansion on the common-law definition of burglary, the locational element of which encompassed "dwellings" including the sorts of habitations covered by the Tennessee law. *Id.* at 43a-46a. Judge Sutton explained that the concurring opinions' contrary assertions erroneously conflated Blackstone-era common law with the "common law in 1984, when Congress enacted the Armed Career Criminal Act." *Id.* at 53a. "By then," he observed, "the consensus of the state courts—the true authorities on American common law—was that tents and vehicles designed and used for human accommodation count as dwellings." *Ibid.* (citing examples).

Judge Sutton also observed that Tennessee's aggravated-burglary offense (1) mirrors the Model Penal Code's definition of "occupied structure," which *Taylor* cited in determining the elements of generic burglary; (2) matches the traditional meaning of "dwelling house" in *Black's Law Dictionary*; and (3) is consistent with federal cases holding that the term "burglary of a dwelling," as used in former Sentencing Guidelines § 4B1.2 (2015), reached vehicles and tents designed for human habitation. App., *infra*, at 46a-47a (citations omitted). Judge Sutton reasoned that because "*Taylor* tells us that burglary of a dwelling is always generic, and a uniform body of precedent tells us that Tennessee's definition of 'habitation' applies only to dwellings[,] * * * [t]he statute is generic" and respondent's convictions under it qualify as violent felonies. *Id.* at 47a-48a.

Judge Sutton criticized the majority for taking out of context statements by this Court that burglary statutes that "includ[e] places, such as automobiles and vending machines" cover more locations than generic burglary. App., *infra*, 48a (quoting *Taylor*, 495 U.S. at 599). He observed that those statements had not addressed statutes limited to the burglary of dwellings. *Id.* at 48a-49a. And he admonished the majority for "isolat[ing] three words from *Taylor*, lift[ing] them from their context, and in the process eliminat[ing] common law burglary of a dwelling, which *Taylor* tells us * * * is the heart of the crime," from the scope of ACCA burglary. *Id.* at 50a-51a. Judge Sutton concluded that the result of the majority's opinion was to "effectively read[] 'burglary' out of the Act"—a result that "should give us all pause." *Id.* at 52a.

REASONS FOR GRANTING THE PETITION

The court of appeals' holding—that burglary of a nonpermanent or mobile structure that is used or adapted for overnight accommodation can never qualify as generic burglary—all but erases the term "burglary" from the ACCA's text. In a sharp departure from this Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990), which tethered ACCA "burglary" to the "sense in which the term is now used in the criminal codes of most States," *id.* at 598, the decision below defines generic burglary in a manner that would include very few States' burglary laws. Both at the time the statutory language was enacted and now, most States have classified the intrusion of at least some nonpermanent or mobile structures, such as vehicles adapted for overnight accommodation, as burglary. The court of appeals' refusal to consider burglary of nonpermanent or mobile habitable structures a "violent felony" is also at odds

with Congress's concern about the potential for violent confrontations with the "occupants of the home," *id.* at 581 (quoting S. Rep. No. 190, 98th Cong., 1st Sess. 3-5 (1983) (Senate Report)), a concern that applies just as much to a mobile home as to a mansion house. This Court's intervention is warranted to correct the court of appeals' error and resolve a division in the courts of appeals about the scope of this very common ACCA predicate.

A. The Court Of Appeals Erred In Holding That "Burglary" Under The ACCA Excludes Burglary Of Dwellings That Are Mobile Or Nonpermanent

1. The original 1984 version of the ACCA provided an enhanced sentence for offenders who had three previous convictions "for robbery or burglary," with "burglary" defined to include "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." Armed Career Criminal Act of 1984 (1984 ACCA), Pub. L. No. 98-473, Tit. II, ch. 18, 98 Stat. 2185 (18 U.S.C. App. 1202(a) (Supp. III 1985)) (repealed in 1986 by the Firearm Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 104(b), 100 Stat. 459); see *Taylor*, 495 U.S. at 581. When Congress amended the list of enumerated offenses in 1986, it left burglary in place as the first of those offenses, but deleted the preexisting definitional section. See *Taylor*, 495 U.S. at 582-585 (discussing this history); Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39; 18 U.S.C. 924(e)(2)(B).

In *Taylor*, this Court held that Congress intended "burglary" in the amended version of the ACCA to have a "uniform definition." 495 U.S. at 580; see *id.* at 591-

592. The Court declined to adopt the common law's definition of burglary—"the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony"—because that narrow definition "ha[d] little relevance to modern law enforcement concerns" that animated the ACCA. *Id.* at 580 n.3, 593 (citation omitted). The Court instead adopted a broader construction of "burglary" that encompassed any "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

Taylor explained that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. As the appendix to this petition illustrates, at the time of the 1986 amendments, an overwhelming majority of jurisdictions—43 States and the District of Columbia—had at least one burglary statute that protected nonpermanent or mobile structures, such as vehicles, boats, and tents, in addition to residences and other buildings. App., *infra*, 81a-97a. Like the Tennessee statute at issue here, those statutes would have covered a nonpermanent or mobile structure that had been adapted or was regularly used for overnight accommodation. See *ibid.* In so doing, they collectively reflected a consensus view that the criminal law of burglary should extend beyond its Founding-era common-law roots to "protect[] the humble tenant in his tent as well as his more fortunate neighbor in his palace." *Favro* v. *State*, 46 S.W. 932, 933 (Tex. Crim. App. 1898); see also *People* v. *Netznik*, 383 N.E.2d 640, 643 (Ill. App. Ct. 1978) ("[T]he provision was intended to secure the person or property of a tent-dweller or camper in the use of his tent to the same extent it secures that of an owner in the use of his house, church or shop.").

Taylor further explained that its definition of generic burglary "approximate[d] [the definition] adopted by the drafters of the Model Penal Code." 495 U.S. at 598 n.8. Since 1980, the Model Penal Code has described burglary as the unlawful entry into "a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein." Model Penal Code § 221.1(1) (1980). The phrase "occupied structure" includes "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." *Id.* § 221.0(1). The Code's commentary accordingly makes clear that although someone could not be prosecuted for burglarizing an ordinary motor vehicle or freight car, he could be prosecuted for burglarizing a trailer home. *Id.* § 221.1 cmt. 3(b). By defining burglary to include locations with "apparent potential for regular occupancy," the drafters of the Model Penal Code directed the offense "to those intrusions that are typically the most alarming and dangerous." *Ibid.*

As *Taylor* observed, Congress's inclusion of burglary in the ACCA was similarly motivated by a concern about burglary's "inherent potential for harm to persons," 495 U.S. at 588, particularly in the context of home invasions. In drafting the original 1984 version of the statute, Congress had been disturbed by statistics showing that career criminals commit a large percentage of robbery and burglary offenses. See *id.* at 581. Congress viewed burglary, in particular, as "one of the 'most damaging crimes to society' because it involves 'invasion of victims' homes or workplaces, violation of their privacy, and loss of their most personal and valued possessions.'" *Ibid.* (brackets omitted) (quoting

H.R. Rep. No. 1073, 98th Cong., 2d Sess. 3 (1984) (House Report)). Congress recognized that burglary offenses trigger the possibility of violent confrontation "depending on the fortuitous presence of the occupants of the home when the burglar enters." *Ibid.* (quoting Senate Report 4); see *id.* at 585 (discussing similar statements during hearings on 1986 amendments). And it accordingly ensured that a history of such offenses would trigger enhanced punishment under the ACCA. See *id.* at 581-582.

2. The Tennessee aggravated-burglary statute at issue here criminalizes precisely the sort of home invasions that lie at the "heart of the crime" of burglary, App., *infra*, 51a (Sutton, J., dissenting), as defined in *Taylor*. The statute prohibits burglary of a "habitation," Tenn. Code. Ann. § 39-14-403(a) (1997), defined as a "structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons" or a "self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant," Tenn. Code Ann. § 39-14-401(1)(A)-(B) (Supp. 2001).

The Tennessee statute thus prohibits burglary in "the generic sense in which the term [was] used in the criminal codes of most States." *Taylor*, 495 U.S. at 598. It is comparable to or narrower than all but a small handful of state burglary statutes in existence at the time of the ACCA's 1986 amendments. The 44 jurisdictions that protected nonpermanent or mobile structures in 1986 include 19 that had expanded their statutes to nonpermanent or mobile structures generally, as well as 25 that had extended their statutes to nonpermanent

or mobile structures adapted or used for overnight accommodation (and, in some cases, other purposes as well). See App., *infra*, 81a-97a.

The Tennessee statute also fits within the Model Penal Code definition of burglary that *Taylor* described as a close analogue of generic burglary. See 495 U.S. at 598 n.8. All of the locations covered by the Tennessee statute would be considered "occupied structure[s]" under the Model Penal Code. See Model Penal Code §§ 221.0(1), 221.1(1) & cmt. 3(b) (1980). Coverage of such structures effectuates the congressional design to provide enhanced punishment for the possession of firearms by recidivist criminals who had committed particularly dangerous home-invasion offenses. Approximately 6.4% of all housing units in the United States, or roughly 8.5 million such units, are mobile homes. See American FactFinder, U.S. Census Bureau, *Selected Housing Characteristics, 2011-2015 American Community Survey 5-Year Estimates*, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk. Nothing in the ACCA suggests that Congress intended to treat the burglary of mobile homes—and the danger such crimes pose to the people who live in them—as less serious than other types of burglary. Indeed, "the burglary of a mobile home or camper is often likely to pose a *greater* risk of violence to the occupant or owner than the burglary of a building or house because it is more difficult for the burglar to enter or escape unnoticed." *United States* v. *Spring*, 80 F.3d 1450, 1462 (10th Cir.) (emphasis added), cert. denied, 519 U.S. 963 (1996).

3. The definition of generic burglary adopted by the majority below—which excises the invasion of many common types of dwellings from the scope of the

crime—is one that most state burglary statutes cannot satisfy. The vast majority of States have at least one burglary statute penalizing the burglary of a nonpermanent or mobile structure used or adapted for overnight accommodation, and in many States, *all* burglary statutes cover those locations. Yet, the majority's rule would mean that convictions under those statutes do not qualify as "burglary" for purposes of the ACCA. That cannot be what Congress intended when it enacted the ACCA. *Taylor* explicitly rejected a construction of "burglary" that "would come close to nullifying that term's effect in the statute," 495 U.S. at 594, as would the court of appeals' decision here.

The court of appeals erred in reading this Court's decisions to require such a result. As the court of appeals observed (App., *infra*, 4a-5a, 6a-7a, 8a (citation omitted)), this Court has on several occasions stated that generic burglary does not encompass unlawful entry into "vehicles," "automobiles," and "vessel[s]." See *Mathis* v. *United States*, 136 S. Ct. 2243, 2250 (2016) (statute covering "any building, structure, [or] land, water, or air vehicle" overbroad) (citation and emphasis omitted; brackets in original); *Nijhawan* v. *Holder*, 557 U.S. 29, 35 (2009) (statute covering a "vessel," rather than a "building," overbroad); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186-187 (2007) (statute covering vehicles, rather than a "building or structure," overbroad) (citation omitted); *Shepard* v. *United States*, 544 U.S. 13, 15-16 (2005) (statute covering "boat or motor vehicle," rather than "building or enclosed space," overbroad); *Taylor*, 495 U.S. at 599 (statute covering "automobiles and vending machines" overbroad). But none of those cases examined a state burglary statute that was lim-

ited to vehicles and other structures that are habitations. See App., *infra*, 48a-49a (Sutton, J., dissenting). The Court's repeated recognition that generic burglary does not cover *all* vehicles or vessels does not answer the more particularized question here.

The majority below was likewise wrong to premise its constricted definition of generic burglary on the view that "*Taylor* emphasizes a place's form and nature—not its intended use or purpose—when determining whether a burglary statute's locational element is a 'building or other structure.'" App., *infra*, 5a (citation omitted). That is a false dichotomy, with no foothold in *Taylor*'s use of the phrase "building or other structure." A place's "form and nature," *ibid.*, will always reflect its "intended use or purpose," *ibid.*, to at least some degree. As Judge Sutton observed, "form follows function, making it impossible for *any* definition of burglary to avoid functional considerations." *Id.* at 50a. A houseboat, for example, is different from a pleasure-boat. And the approach of the majority below would have the inexplicable result of treating burglary of a "gazebo[]," *ibid.*, but not burglary of a trailer home, as a violent felony.

The majority below also erred in focusing on the fact that the later-removed 1984 ACCA definition of "burglary" covered only "building[s]." See App., *infra*, 9a. Although the legislative history does not show that Congress intended the 1986 definition to be "something entirely different," *Taylor*, 495 U.S. at 590, *Taylor* explicitly defines "burglary" under the amended ACCA to include unlawful entry into a "building *or other structure*." *Id.* at 598 (emphasis added). And it makes clear that the set of "other structure[s]" covered by generic burglary should be defined by reference to contemporary state burglary laws and the Model Penal Code, *id.*

at 598 & n.8, both of which support coverage of the habitable vehicles and other structures protected by the Tennessee law at issue here.

The majority below also misread, and attached outsized importance to, the 1986 edition of 2 Wayne R. LaFave & Austin W. Scott, Jr.'s *Substantive Criminal Law* (LaFave) that is cited in *Taylor*. App., *infra*, 10a-11a (citing *Taylor*, 495 U.S. at 598). According to the majority, that treatise "saw vehicles as distinct from structures" because it distinguished burglary statutes whose locational element is described "as a 'building' or 'structure'" from burglary statutes "extend[ing] to still other places, such as all or some types of vehicles." *Id.* at 11a (emphasis omitted) (quoting LaFave § 8.13(c)). But the treatise in fact recognized that States had "broadly construed" the words "building" and "structure," and it explained that covering vehicles "may make sense in some circumstances, *as where the vehicle is a motor home*." LaFave § 8.13(c) & n.85 (emphasis added). Indeed, the treatise's sole example of a "situation[that] ought not be treated as burglary" is a case involving a defendant's "opening [the] hood of [a] car and taking [the] battery," *id.* § 8.13(c) n. 85 (citing *State* v. *Pierre*, 320 So. 2d 185 (La. 1975))—a situation far afield from anything covered by the Tennessee provision at issue here.

B. The Question Presented Warrants This Court's Review

The question whether burglary of a habitable structure that is nonpermanent or mobile can qualify as "burglary" under the ACCA warrants this Court's review. The question has divided the courts of appeals. And the definition of ACCA burglary—a frequently recurring ACCA predicate and the only one that Congress has consistently listed in the statute since its inception—is

a matter of exceptional importance to the consistent administration of the federal criminal law.

1. As the majority below recognized (App., *infra*, 12a-13a), a conflict exists in the courts of appeals on the question presented.

The Fourth, Eighth, and Ninth Circuits have adopted the same narrow definition of generic burglary as the decision below. See *United States* v. *Sims*, 854 F.3d 1037, 1039-1040 (8th Cir. 2017) (holding that Arkansas residential burglary statute is broader than generic burglary because it "criminalizes the burglary of vehicles where people live or that are customarily used for overnight accommodations"), petition for cert. pending (filed Nov. 21, 2017); *United States* v. *White*, 836 F.3d 437, 445-446 (4th Cir. 2016) (holding that West Virginia burglary statute is broader than generic burglary because it protects "dwelling house[s]," defined to include, *inter alia*, "mobile home[s]" and "house trailer[s]") (citation omitted); *United States* v. *Grisel*, 488 F.3d 844, 851 n.5 (9th Cir.) (en banc), cert. denied, 552 U.S. 970 (2007) ("To the extent that our precedents suggest that state statutes satisfy the categorical inquiry when they define burglary to include non-buildings adapted for overnight accommodation, they are overruled.").[2]

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[2] Contrary to the suggestion of the majority below (App., *infra*, 13a), the Third Circuit has not directly addressed the question presented here. In *United States* v. *Bennett*, 100 F.3d 1105, 1109 (1996), the court of appeals held that Pennsylvania's burglary statute, which covers "[a]ny structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein," 18 Pa. Cons. Stat. § 3501 (1995), is broader than generic burglary. The Third Circuit had no occasion to consider whether a statute that covers only habitable structures constitutes generic burglary; it instead relied in significant part on the business-purposes component of the Pennsylvania statute. *Ibid.*

In contrast, the Tenth Circuit has held that burglary of a "vehicle that is adapted for the overnight accommodation of persons" qualifies as generic burglary because it is "analogous to the burglary of a building or house." *Spring*, 80 F.3d at 1462 (citation omitted); see *United States* v. *Patterson*, 561 F.3d 1170, 1173 (10th Cir. 2009) (reaffirming *Spring* and finding that a conviction under a different Tennessee burglary statute "clearly qualifie[d] as a prior crime of violence" under the Sentencing Guidelines), cert. denied, 558 U.S. 1150 (2010). The Fifth Circuit has also so held, but it has recently granted rehearing en banc on that question. See *United States* v. *Herrold*, 685 Fed. Appx. 302 (2017) (per curiam), reh'g en banc granted, 693 Fed. Appx. 272 (5th Cir. 2017).

As the concurring opinions below recognized, even an en banc circuit decision cannot satisfactorily resolve the question presented. Judge Boggs described the results of the decision below as "bizarre" (App., *infra*, 26a) and Judge White similarly found them "puzzling" (*id.* at 42a). Yet Judge White took the view that even "[i]f the results are unsatisfying, we must accept them until Congress changes the ACCA or the Supreme Court its interpretation of it." *Ibid*; see *id.* at 29a (Boggs, J., concurring) ("[P]erhaps the [Supreme] Court will soon clarify the question before us."). That is because the majority's decision rests in significant part on an interpretation of this Court's precedents that only this Court (or Congress) can conclusively disavow. See *id.* at 48a (Sutton, J., dissenting) (noting that the majority "makes the mistake of reading an opinion (in truth part of an opinion) like a statute").

2. That three circuits—the Fifth, Sixth, and Ninth—have considered the question presented en banc illustrates the critical importance of the issue to the ACCA's operation.

Burglary has always played a central role in the statute. Since the ACCA's enactment in 1984, Congress has deemed enhanced prison sentences to be warranted for recidivist burglars. Burglary was one of only two offenses, along with robbery, singled out as predicates in the original version of the ACCA. See 1984 ACCA, Tit. II, ch. 18, 98 Stat. 2185 (repealed by FOPA § 104(b), 100 Stat. 459). As this Court explained in *Taylor*, that legislative choice reflected Congress's finding—amply documented in the ACCA's legislative history—that burglary was both one of "the crimes most frequently committed by * * * career criminals," 495 U.S. at 581 (citing House Report 1, 3; Senate Report 5), and one of "'the most common violent street crimes,'" *ibid.* (quoting Senate Report 5). Accordingly, even when Congress removed robbery as an explicit enumerated offense two years later, burglary remained the first enumerated offense. See 18 U.S.C. 924(e)(2)(B)(ii) (enumerating "burglary, arson, * * * extortion," and offenses "involv[ing] use of explosives").

Empirical data confirm that burglary offenses are both frequent and inherently dangerous. According to the Bureau of Justice Statistics, an estimated average 3.7 million household burglaries occurred each year between 2003 and 2007. Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, *Victimization During Household Burglary* 1 (Sept. 2010), https://www.bjs.gov/content/pub/pdf/vdhb.pdf. In roughly one million of those burglaries (28%), a household member was present. *Ibid.* And in approximately

266,000 of them (7%), the household member became the victim of a violent crime. *Ibid.*; see also *Tennessee* v. *Garner*, 471 U.S. 1, 27 (1985) (O'Connor, J., dissenting) ("[E]ven if a particular burglary, when viewed in retrospect, does not involve physical harm to others, the 'harsh potentialities for violence' inherent in the forced entry into a home preclude characterization of the crime as 'innocuous, inconsequential, minor, or "nonviolent."'") (quoting *Solem* v. *Helm*, 463 U.S. 277, 316 (1983) (Burger, C.J., dissenting)).

The frequency with which burglary occurs is mirrored in the frequency with which it arises as an ACCA predicate. This Office is informed that the Western District of Tennessee alone has two dozen pending appeals in which the application of the ACCA depends on whether the specific Tennessee aggravated-burglary statute here defines a generic-burglary offense. The decision below upends Congress's design and precludes the federal government from ensuring that those recidivist criminals receive the sentences Congress prescribed. And the problem is not limited to Tennessee. As Judge Sutton noted, the construction adopted by the majority below "effectively reads 'burglary' out of the [ACCA]." App., *infra*, 52a. Under the majority's rule, many jurisdictions would have *no* version or degree of burglary that qualifies as generic, *ibid.*, while others, like Tennessee, would face the "head-scratching outcome" that a lesser crime (in Tennessee, burglary of a building) would qualify as generic burglary, while an aggravated form (in Tennessee, burglary of a "habitation") would not. *Id.* at 50a.

3. This case squarely tees up the question presented and is the best available vehicle for resolving it. The question was thoroughly addressed by the en banc court

of appeals and dispositive of the result below. In conjunction with the filing of this petition, the government is also filing a petition for a writ of certiorari presenting the same question in *United States* v. *Sims*, *supra*, in which the Eighth Circuit held that a conviction under an Arkansas statute that "criminalizes the burglary of vehicles where people live or that are customarily used for overnight accommodations" does not qualify as a prior burglary conviction under the ACCA. 854 F.3d at 1040; see Ark. Code Ann. §§ 5-39-101(4)(A), 5-39-201(a)(1) (2013). The more thorough consideration of the question presented by the en banc court in this case makes it a better vehicle for resolving the question than *Sims*. But *Sims* would also be an adequate vehicle for deciding the question presented, and if the Court wishes to review the issue in the context of multiple state statutes, the Court could grant the petitions in both cases and consolidate them for review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2017

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14-6158

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

VICTOR J. STITT, II, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the Eastern District of Tennessee at Winchester
No. 4:12-cr-00019-1
Harry S. Mattice Jr., District Judge

Decided and Filed: June 27, 2017

OPINION

Before: COLE, Chief Judge; BOGGS, BATCHELDER, MOORE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, MCKEAGUE, GRIFFIN, KETHLEDGE, WHITE, STRANCH, and DONALD, Circuit Judges*

COOK, Circuit Judge. In 2007, we held that a conviction under Tennessee's aggravated-burglary statute, Tenn. Code Ann. § 39-14-403, categorically qualifies as an enumerated "violent felony" that triggers a sen-

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* The clerk submitted this case to the en banc panel of the Sixth Circuit Court of Appeals before Judge Amul Thapar received his commission on May 25, 2017.

tencing enhancement under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). *United States v. Nance*, 481 F.3d 882, 887 (6th Cir. 2007); *see also United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015). Several years later, we reached the opposite conclusion about Ohio's similarly worded burglary statute, Ohio Rev. Code § 2911.12(A)(3). *United States v. Coleman*, 655 F.3d 480, 482 (6th Cir. 2011), *abrogated on other grounds by Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). We resolve this conflict by overruling *Nance* and holding that a conviction for Tennessee aggravated burglary is not a violent felony for purposes of the ACCA.

I.

During a heated argument in 2011, Victor Stitt tried to shove a loaded handgun into his girlfriend's mouth while threatening to kill her. When a neighbor called the police, Stitt fled to his mother's home, where he surrendered to authorities after a brief foot chase. Detectives recovered the gun lying on the ground within his reach.

A jury found Stitt guilty of possessing a firearm as a convicted felon, in violation of 18 U.S.C. § 922(g). Due to his nine prior "violent felony" convictions—including six for Tennessee aggravated burglary—the court designated Stitt an armed career criminal under the ACCA and sentenced him to 290 months' imprisonment.

On appeal, Stitt argued that none of his nine convictions qualify as violent felonies. The government conceded that *Johnson v. United States* invalidated the violent-felony status of three of his prior offenses, leaving only his six aggravated-burglary convictions at

issue. *See* 135 S. Ct. at 2563. Bound by *Nance*—which held that Tennessee aggravated burglary fits the Supreme Court's definition of "generic burglary"—we affirmed his sentence. *United States v. Stitt*, 637 F. App'x 927, 931-32 (6th Cir. 2016).

Stitt comes before us now on a petition for rehearing en banc, which we granted to resolve whether a conviction for Tennessee aggravated burglary constitutes a violent felony under the ACCA. *United States v. Stitt*, 646 F. App'x 454 (6th Cir. 2016). Because we conclude that Tennessee's aggravated-burglary statute is broader than the definition of generic burglary, we hold that a conviction under the statute does not qualify as an ACCA predicate offense.

II.

The ACCA imposes a fifteen-year minimum sentence on any defendant who, having been convicted of three prior "violent felonies," is found guilty of being in possession of a firearm. *See* 18 U.S.C. §§ 922(g), 924(e). Although the ACCA enumerates burglary as one of several "violent felonies" that can lead to the fifteen-year minimum, *see* § 924(e)(2)(B)(ii), not every conviction labeled as "burglary" under state law qualifies as a violent felony. *Taylor v. United States*, 495 U.S. 575, 590-92 (1990). Instead, Congress intended to encompass only those convictions arising from burglary statutes that conform to, or are narrower than, the "generic" definition of burglary. *Id.* at 598.

To determine whether Stitt's aggravated-burglary convictions qualify, we apply the "categorical approach." *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). Under this approach, we compare the statu-

tory elements of Tennessee aggravated burglary to the elements of "generic burglary." *See id.* If the elements of Tennessee aggravated burglary "are the same as, or narrower than, those of [generic burglary,]" Stitt's convictions count as violent felonies under the ACCA. *Id.*

A. Applying the Categorical Approach

Tennessee defines aggravated burglary as the "burglary of a habitation," Tenn. Code Ann. § 39-14-403, and defines "habitation" as "any structure . . . which is designed or adapted for the overnight accommodation of persons," *id.* § 39-14-401(1)(A). The term "habitation" includes "mobile homes, trailers, and tents," as well as any "self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant." *Id.*

By contrast, the Supreme Court has determined that under the ACCA, "generic burglary" means "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S. at 598. Although the Court left "building or other structure" undefined, it has confirmed repeatedly that vehicles and movable enclosures (e.g., railroad cars, tents, and booths) fall outside the definitional sweep of "building or other structure." *See id.* at 599; *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016) (explaining that Iowa's burglary statute "covers more conduct than generic burglary" because it "reaches a broader range of places: 'any building, structure, *[or] land, water, or air vehicle.*'" (alteration in original) (citations omitted)); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (differentiating between break-

ing into a "vessel," which would not qualify as generic burglary, and "breaking into a building," which would); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-87 (2007) (noting that Massachusetts defines burglary to include breaking into a vehicle, "which falls outside the generic definition of 'burglary,' for a car is not a 'building or structure'" (citations omitted)); *Shepard v. United States*, 544 U.S. 13, 15-16 (2005) ("The [ACCA] makes burglary a violent felony only if committed in a building or enclosed space . . . , not in a boat or motor vehicle.").

By including "mobile homes, trailers, and tents," as well as any "self-propelled vehicle," Tennessee's aggravated-burglary statute includes exactly the kinds of vehicles and movable enclosures that the Court excludes from generic burglary. But the statute comes with a wrinkle: it criminalizes the unauthorized entry into vehicles and movable enclosures (with criminal intent) *only if* they are "designed or adapted for the overnight accommodation of persons." Tenn. Code Ann. § 39-14-401(1). In other words, it restricts the ambit of the statute to only those vehicles and movable enclosures that are habitable.

The issue before us, then, is whether a burglary statute that covers vehicles or movable enclosures only if they are habitable fits within the bounds of generic burglary. We hold that it does not. Our reading of *Taylor* and its progeny supports this conclusion.

To start, *Taylor* emphasizes a place's form and nature—not its intended use or purpose—when determining whether a burglary statute's locational element is a "building or other structure." *Taylor*, 495 U.S. at 598; *United States v. Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010) ("The definitional focus [of generic burglary]

is on the nature of the property or place, not on the nature of its use at the time of the crime."), *abrogated on other grounds as recognized by United States v. Howard*, 742 F.3d 1334, 1344-45 (11th Cir. 2014); *United States v. White*, 836 F.3d 437, 445-46 (4th Cir. 2016) (finding it "immaterial" to the categorical approach that West Virginia's burglary statute confines coverage to vehicles "primarily designed for human habitation").

Additionally, throughout *Taylor*, the Court repeatedly distinguishes vehicles and the like from "building[s] and other structure[s]." 495 U.S. at 598. It begins by offering California common law and Texas's burglary statute—both of which criminalize the unauthorized entry of vehicles—as examples of overly broad burglary definitions. *Id.* at 591 (describing California burglary as "so broadly [defined] as to include shoplifting and theft of goods from a 'locked' but unoccupied automobile" and Texas burglary as "includ[ing] theft from [an] . . . automobile"). The *Taylor* Court then explains that because they "includ[e] places, such as *automobiles*," they define crimes falling outside the generic definition of burglary. *Id.* at 599 (emphasis added). Similarly, in its discussion of Taylor's prior burglary convictions, the Court recognized that Missouri's second-degree burglary statute was broader than generic burglary because it included "breaking and entering 'any booth or tent, or any boat or vessel, or railroad car.'" *Id.* (citations omitted).

Finally, the Supreme Court has held fast to the distinction between vehicles and movable enclosures versus buildings and structures in every single post-

Taylor decision. *See Mathis*, 136 S. Ct. at 2250[1]; *Nijhawan*, 557 U.S. at 35; *Duenas-Alvarez*, 549 U.S. at 186-87; *Shepard*, 544 U.S. at 15-16. The Court's adherence to this distinction over the course of nearly thirty years persuades us that the Court meant exactly what it said: vehicles and movable enclosures fall outside the scope of generic burglary. *See Mathis*, 136 S. Ct. at 2254 ("[A] good rule of thumb for reading our decisions is that what they say and what they mean are one and the same.").

B. The Government's Response

The government disputes our reading of *Taylor*, offering two arguments to broaden "building or other structure" so as to encompass anything "habitable," even if movable or temporary. Neither argument persuades us.

First, latching onto the *Taylor* Court's statement "that Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most states," 495 U.S. at 598, the government conducts its own fifty-state survey of the burglary statutes in effect at the time the Court decided *Taylor*. It concludes that (a) the overwhelming majority of states included vehicles and movable enclosures in their burglary statutes, and (b) a little more than half the states'

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[1] Like the Tennessee statute at issue here, Iowa's burglary statute limited its scope to vehicles "adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity." Iowa Code § 702.12 (2013). Nonetheless, the *Mathis* Court explained that Iowa's burglary statute did not categorically qualify as generic burglary because it criminalized the entry of "land, water, or air vehicle[s]." *See Mathis*, 136 S. Ct. at 2250.

burglary statutes specifically "covered movable structures adapted for specific purposes such as overnight accommodation, business, or education." This, the government asserts, shows that the *Taylor* Court meant to include such "movable structures" under "buildings or other structures."

Second, the government argues that because the Model Penal Code's ("MPC") burglary definition—which includes occupied structures—"served as the basis" for the *Taylor* Court's definition of generic burglary, the Court intended to include occupied structures under the phrase "building or other structure." The government hangs its entire argument on a single footnote in which the Court explains that the generic definition of burglary "approximates that adopted by the drafters of the [MPC]." *Id.* at 598 n.8.

Both the government's arguments suffer from the same problem: they ignore the Court's clear and unambiguous language that "building or other structure" excludes *all* things mobile or transitory. Indeed, the government focuses its arguments *not* on interpreting the words the Court chose to define generic burglary, but on divining Congress's intent from the MPC and state statutes. Given the Court's statement that burglary statutes that "includ[e] places, such as automobiles" fall outside the scope of generic burglary—and its steadfast repetition of similar language in later cases—we find the government's arguments unavailing. *Id.* at 599.

Moreover, even if we accept the government's invitation to focus on the *Taylor* Court's own determination of congressional intent, its arguments still fail. To understand why, start with the question addressed

in *Taylor*: how should the Court define "burglary" under the ACCA when the statute supplies no definition? *Id.* at 577. In answering the question, the Court drew on three sources: (1) a definition of "burglary" from a prior version of the ACCA, (2) the MPC, and (3) a general sense of burglary derived from a prominent criminal law treatise. We too review these three sources.

When Congress enacted the ACCA in 1984, it defined burglary as "any felony consisting of entering or remaining surreptitiously within a *building* that is property of another with intent to engage in conduct constituting a Federal or State offense." *Id.* at 581 (emphasis added) (quoting 18 U.S.C. § 1202(c)(9) (1984)). Congress's choice of "building" necessarily excluded anything movable.

Congress left out this 1984 definition of burglary when it amended the ACCA in 1986. But in formulating a replacement, the Court hewed closely to the 1984 definition because it believed Congress intended to retain the original definition's substance. It observed that "nothing in the [legislative] history [suggested] that Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different."[2] *Id.* at 590, 598. The Court therefore settled on a definition of generic burglary that "[wa]s practically identical to the" one Congress had provided in 1984 (which excluded vehicles and movable enclosures). *Id.* at 598.

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[2] The Court even suggested that "the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process." *Id.* at 589-90.

The Court's definitional emphasis on "the nature of the property or place" becomes more apparent when contrasting generic burglary with the MPC's burglary definition. *Rainer*, 616 F.3d at 1215. The MPC reads: "[a] person is guilty of burglary if he enters a building or *occupied structure*, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless . . . the actor is licensed or privileged to enter." *Taylor*, 495 U.S. at 598 n.8 (emphasis added) (quoting American Law Institute, Model Penal Code § 221.1 (1980)). The *Taylor* Court could have adopted the MPC's language of "building or *occupied* structure." *See id.* (emphasis added). Instead, it omitted "occupied," signaling that for the locational element, a place's form—rather than its adaptation for habitability—marks the dividing line between generic and non-generic burglary. *See id.* at 598.

Finally, the Court sought to craft a definition of generic burglary that captured the elements common to state burglary statutes.[3] To help distill those elements, the Court turned to the 1986 edition of Wayne LaFave's classic treatise, *Substantive Criminal Law*. *See Taylor*, 495 U.S. at 598; *see also United States v. Grisel*, 488 F.3d 844, 848-49 (9th Cir. 2007) (en banc). Regarding the locational element, LaFave found that "[m]odern statutes . . . typically describe the place

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[3] "Although the exact formulations vary [for each state], the generic, contemporary meaning of burglary contains *at least* the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime. *See* LaFave & Scott *supra*, n.3 . . . § 8.13(c), p. 471 (modern statutes 'typically describe the place as a "building" or "structure"'). . . ." *Taylor*, 495 U.S. at 598 (emphasis added) (footnote omitted).

as a 'building' or 'structure,'" but that some "also extend to still *other places, such as all or some types of vehicles*." Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(e) (1986) (emphasis added). Clearly, LaFave viewed buildings and structures as distinct from "vehicles." And the Court, in turn, adopted the same "typical" locational element—"building" or "structure"—used by states while omitting any reference to vehicles, suggesting that it, like LaFave, saw vehicles as distinct from structures.

In sum, the *Taylor* Court's consultation of the three sources—particularly its rejection of the MPC's "occupied structure" and its adoption of LaFave's description of the locational element—refutes the government's argument that we should interpret "building and other structure" in strict conformance with the MPC and the government's fifty-state survey. *See Grisel*, 488 F.3d at 849 ("[T]he Supreme Court in *Taylor* defined burglary using a generic definition that we are bound to obey even if we think that the definition is deficient."). Accordingly, we reject the view that a state burglary statute that limits its scope to only those vehicles and movable enclosures that are habitable fits under the generic definition of burglary.

C. *Nance*

Our conclusion that Tennessee's aggravated-burglary statute sweeps more broadly than generic burglary conflicts with our decision in *Nance*, which held that the statute matches the ACCA's definition of generic burglary.[4] 481 F.3d at 888. We now overrule *Nance*.

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[4] Bound by the precedent set in *Nance*, we held in *Priddy* that a defendant's conviction for Tennessee aggravated burglary qualified

In *Nance*, we correctly stated that Tennessee "[a]ggravated burglary occurs when an individual enters a habitation 'without the effective consent of the property owner' and, . . . intends to commit a felony." *Id.* (alteration and omission in original) (quoting *United States v. Sawyers*, 409 F.3d 732, 737 (6th Cir. 2005)). We neglected, however, to scrutinize the statutory definition of "habitation," which includes vehicles, tents, and other movable enclosures. *See* Tenn. Code Ann. § 39-14-401(1). We compounded this error by comparing the elements of Tennessee's aggravated-burglary statute to the following truncated definition of generic burglary: a burglary "committed in a building or enclosed space." *Nance*, 481 F.3d at 888 (quoting *Shepard*, 544 U.S. at 16). But the full definition from *Shepard* states that the ACCA "makes burglary a violent felony only if committed in a building or enclosed space . . . *not in a boat or motor vehicle*." 544 U.S. at 15-16 (emphasis added). As a result of comparing an incomplete definition of Tennessee aggravated burglary to an incomplete definition of generic burglary, we incorrectly concluded that a "habitation" is a "building or enclosed space" and that a conviction for Tennessee aggravated-burglary therefore constituted a violent felony. *Nance*, 481 F.3d at 888.

We were not alone in shortcutting the categorical-approach analysis. At least two other circuits committed the same error of looking at the statutory elements of burglary statutes without considering the definition of key terms such as "occupied structure" or "habitation." *See United States v. Field*, 39 F.3d 15,

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as a violent felony. 808 F.3d at 684. *Priddy* did not expand further on *Nance*'s reasoning.

20 (1st Cir. 1994); *United States v. Silva*, 957 F.2d 157, 162 (5th Cir. 1992).

Where courts have accounted for these statutory definitions, most have held that statutes criminalizing the burglary of vehicles and movable enclosures, even where limited to "habitations" or "occupied structures," fall outside the generic definition of burglary. *Compare White*, 836 F.3d at 446; *United States v. Bess*, 655 F. App'x 518, 519 (8th Cir. 2016) (per curiam); *Coleman*, 655 F.3d at 482; *Rainer*, 616 F.3d at 1215; *Grisel*, 488 F.3d at 851; *United States v. Bennett*, 100 F.3d 1105, 1109 (3d Cir. 1996), *with United States v. Spring*, 80 F.3d 1450, 1462 (10th Cir. 1996).[5]

In short, we overrule *Nance* because that case misapplied the categorical approach. As explained above, a violation of Tennessee's aggravated-burglary statute is not categorically a violent felony.

III.

Our conclusion that a conviction under Tennessee's aggravated-burglary statute does not categorically qualify as a violent felony does not end our inquiry. Even if a state burglary statute criminalizes more conduct than generic burglary, it may do so by listing multiple elements in the alternative, thus setting forth different crimes, and one or more of those crimes might

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[5] The dissent rejects the way we count the circuits, arguing that the circuit split is actually more or less even. (Dissent Op. at 7-8.) But the dissent's own count misleads—two of the three cases it claims in its column shortcut the categorical-approach analysis. *See Nance*, 481 F.3d at 888; *Silva*, 957 F.2d at 162. And it fails to recognize *Grisel*—which falls in our column—as the controlling precedent in the Ninth Circuit.

match the definition of generic burglary. *Mathis*, 136 S. Ct. at 2248-49 (citing *Shepard*, 544 U.S. at 26). If the statute does list alternative elements, we apply the "modified" categorical approach to establish which of the alternative crimes forms the basis of the defendant's conviction.

Here, both parties agree that "the definition of habitation is indivisible"—that is, it lays out alternative *means* to fulfilling a single element rather than alternative *elements*. *See id.* at 2251 n.1 (abrogating *United States v. Ozier*, 796 F.3d 597 (6th Cir. 2015)). Our review confirms that Tennessee's aggravated-burglary statute is indivisible.

To determine a statute's divisibility, we look first at the language of the statute and state-court decisions; if neither source provides a definitive answer, we turn to the record of conviction. *See id.* at 2249, 2256; *see also United States v. Ritchey*, 840 F.3d 310, 317-18 (6th Cir. 2016). If we still cannot discern whether a statute presents elements or means, the statute is indivisible. *Mathis*, 136 S. Ct. at 2257.

The *Mathis* Court explained that a statute is indivisible when it lists examples to clarify a term, as opposed to listing alternative elements to define multiple crimes. *Id.* The Court offered two cases that examined statutes deemed indivisible because they listed "illustrative examples" of various means to fulfilling a single element. *Id.* at 2256. One of those cases—*Howard*, 742 F.3d at 1348—guides our analysis here.

In *Howard*, the Eleventh Circuit reviewed Alabama's third-degree burglary statute, which defined building as "[a]ny structure which may be entered and

utilized by persons for business, public use, lodging or the storage of goods." 742 F.3d at 1348 (alteration in original) (quoting Ala. Code § 13A-7-1(2) (1979)). According to the statutory definition in force at the time, "structure . . . *includes* any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein" and also "*includes* any railroad box car or other rail equipment or trailer or tractor trailer or combination thereof." *Id.* (quoting Ala. Code § 13A-7-1(2) (1979)). Because "[t]he items that follow each use of the word 'includes' in the statute are non-exhaustive examples," the Eleventh Circuit held that Alabama's third-degree burglary statute delineated means rather than elements, rendering the statute indivisible. *Id.*

Tennessee's aggravated-burglary statute follows the pattern of Alabama's third-degree burglary statute to a tee. It defines "habitation" as "any structure . . . which is designed or adapted for the overnight accommodation of persons." Tenn. Code Ann. § 39-14-401(1)(A). Tennessee's definition of habitation "*includ[es]* . . . mobile homes, trailers, and tents"; it also "*[i]ncludes* a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons." *Id.* § 39-14-401(1)(B) (emphasis added). This non-exhaustive list of "illustrative examples" therefore sets forth means rather than elements. Additionally, our review of the case law reveals no decision suggesting otherwise. As such, Tennessee's aggravated-burglary statute is indivisible, thereby foreclosing application of the modified categorical approach.

IV.

Because Tennessee's aggravated-burglary statute is both broader than generic burglary under the categorical approach and indivisible, a conviction under the statute does not count as a violent felony under the ACCA.[6] We therefore REVERSE and REMAND for resentencing consistent with this opinion.

CONCURRENCE

BOGGS, Circuit Judge, concurring.

I

I concur with my colleagues that the Supreme Court's decision in *Taylor* and subsequent cases settle the question before us today and require us to overrule *Nance*. I write separately, however, to respond to statements made in the dissenting opinion regarding (1) whether burglary of a vehicle "designed or adapted for the overnight accommodation of persons," Tenn. Code § 39-14-401(1), was a kind of burglary that the *Taylor* Court would have counted as a "generic" ACCA burglary, and (2) whether vehicles designed or adapted for overnight accommodation are dwellings.

A

The dissent's argument, at bottom, is this: the Tennessee statute before us punishes burglary of a vehicle only when the vehicle is designed or adapted for overnight accommodation (i.e., only when the vehicle is

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[6] Stitt also argues that Tennessee's aggravated-burglary statute lacks the requisite mens rea to qualify as generic burglary. Because we hold that his conviction does not qualify as generic burglary based on the underlying statute's inclusion of vehicles and movable enclosures, we need not address this argument.

a dwelling), unlike statutes that punish burglary of *any* vehicle or burglary of vehicles designed for business, and thus the Tennessee statute before us goes no further than to punish burglary of a dwelling. Any burglary of a dwelling, the dissent reasons, must necessarily be a generic ACCA burglary, because the ACCA's definition of burglary is "broader" than (and thus wholly includes as a subset) common-law burglary of a dwelling. So the Tennessee statute is not too broad.

I will put aside, for now, the question whether these vehicles are, in fact, common-law dwellings, for even if they are, the Tennessee statute is still broader than generic ACCA burglary, and *Taylor* still requires us to reverse *Nance*.

That is because, if we are bound to follow the Supreme Court's ruling in *Taylor*, then we are bound to apply its definition of generic burglary—as the majority notes, "a good rule of thumb" for reading the Court's decisions is that what the Court says and what it means "are one and the same," *Mathis v. United States*, 136 S. Ct. 2243, 2254 (2016), and what the Court said in *Taylor* is *not*, as the dissent would have it, that generic ACCA burglary is "broader" than burglary of a dwelling. Indeed, the Court uses the term "broader" (or "broad" or "broadly") only (1) to describe definitions in the Model Penal Code as encompassing more conduct than traditional common-law burglary, *Taylor v. United States*, 495 U.S. 575, 580 (1990); (2) to discuss the extent to which Congress, in enacting the current version of the ACCA, intended to include more crimes as predicates for the career-criminal designation, *id.* at 583 ("[T]he time has come to broaden [the] definition

[of career criminal] so that we may have a greater sweep and more effective use of this important statute." (quoting 132 Cong. Rec. 7697 (1986))), 586 ("H.R. 4639, on the other hand, was seen as too broad."); (3) to cite a floor statement proposing a definition of ACCA burglary that was "intended to be broader than common law burglary"—but that was not adopted, 590 n.5 (quoting 135 Cong. Rec. 23519 (1989)); (4) to describe state statutory definitions of burglary that encompass more conduct than traditional common-law burglary, 591 (describing California statute as defining burglary "so broadly as to include shoplifting"); or—and this cuts against the dissent's argument—(5) to describe state statutes that "includ[e] places, such as automobiles," as "defin[ing] burglary more broadly" *than generic ACCA burglary*, *id.* at 599.

Never, not once, does the *Taylor* Court state or imply that generic ACCA burglary—as opposed to one of the *rejected* proposed definitions of generic burglary—is "broader" than common-law burglary of a dwelling so as to include all burglaries of dwellings within the set of generic ACCA burglaries. *Contra* Dissenting Op. at 34 (stating that the Court "opted instead for a 'broader "generic" definition' drawn from the Model Penal Code" (emphasis omitted) and citing pages 580, 592, and 599 of *Taylor*, none of which affirm the proposition that *Taylor*'s definition of generic ACCA burglary is "broader" than common-law burglary and "drawn from" the Model Penal Code).

None of the above, of course, *refutes* the dissent's argument; it merely calls into question a premise on which the dissent's argument rests. *Taylor*'s pronouncement of its definition of generic ACCA burglary,

however, *does* refute the dissent. *Taylor* supports its definition of generic ACCA burglary ("an unlawful or unprivileged entry into, or remaining in, a *building or other structure*, with intent to commit a crime," 495 U.S. at 598 (emphasis added)) with a single source: "Wayne LaFave's classic treatise," the majority notes, which identifies the place ("the place," in the singular) of a burglary as a "building" or "structure" and then notes that "[s]ome burglary statutes also extend to *still other places*, such as all *or some* types of vehicles." Wayne R. LaFave & Austin W. Scott, Jr., 2 *Substantive Criminal Law* § 8.13, at 471 (1986) (emphases added) (footnote omitted).

True, "some types of vehicles" could, in the abstract, refer to vehicles designed for trade or other purposes besides the overnight accommodation of persons. But here, "some types of vehicles" refers specifically to vehicles *adapted for* the overnight accommodation of persons. That means that vehicles, even if adapted for overnight habitation, are "other places" that *do not* fit within the definition of "building or structure" adopted by the *Taylor* Court.

We know this because, on the *very same page* of LaFave's treatise that the Supreme Court cites as the sole support for its "building or structure" definition (page 471), the treatise cites the following Texas statute as an example of a statute that punishes burglary of "other places" *rather than* buildings or structures:

§ 30.01. Definitions

In this chapter:

(1) "Habitation" means a structure or vehicle that is adapted for the overnight accommodation of persons, and includes:

(A) each separately secured or occupied portion of the structure or vehicle; and

(B) each structure appurtenant to or connected with the structure or vehicle.

§ 30.02. Burglary

(a) A person commits an offense if, without the effective consent of the owner, he:

(1) enters a *habitation*, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft;

. . . .

Tex. Penal Code §§ 30.01, 30.02 (1986) (emphasis added).

Strikingly, this Texas statute punishes the burglary of buildings or habitations, where habitation is defined as a structure or a vehicle "that is adapted for the overnight accommodation of persons." If the Supreme Court is, as it says it is, relying on LaFave's treatise to provide the "generic, contemporary meaning of burglary," *Taylor*, 495 U.S. at 598, then it would seem that the Supreme Court, like LaFave, has found that Texas's statute punishes burglary of "other places," LaFave & Scott, *supra*, at 471, other than buildings or structures.

Compare the Texas statute with the Tennessee statute before us, which defines "habitation" as "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons," including "a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant." Tenn. Code § 39-14-401(1). Sure, the Tennessee statute is narrower than the Texas statute to the extent that it applies only when the vehicle is "actually occupied at the time of" the burglary. But this distinction is irrelevant to our analysis; as the majority opinion notes, *Taylor*'s definition is the definition of "a place's form and nature," not its *use* at the time of the crime. Majority Op. at 4. And no one argues here that the presence (or not) of an individual within a burgled vehicle temporarily *converts* the vehicle into a building or structure—rather, the question is whether the vehicle, if adapted for overnight accommodation, *is* a building or structure for the purpose of generic burglary.

Because the Supreme Court, in pronouncing the very definition of generic burglary that we must apply today to evaluate convictions under the Tennessee statute, rejected the nearly identically worded Texas statute above as too *broadly* defining burglary to qualify as generic ACCA burglary, then the majority is right to reject the Tennessee statute as broader than generic ACCA burglary for the same reason.

The dissent notes that the Supreme Court's discussions of various burglary statutes (such as Missouri's statute, in *Taylor*, or Iowa's, in *Mathis*) aren't really applicable to Tennessee's statute because those stat-

utes "covered *all* vehicles." Dissenting Op. at 36. But the Supreme Court has made clear that burglary statutes are broader than ACCA generic burglary when they include burglary of *any vehicle at all*—even just vehicles adapted for overnight accommodation. The Missouri and Iowa statutes may have been so broad as to include the entire class of vehicles, but nothing in *Taylor* or any other Supreme Court decision supports the idea that, if those statutes had limited their inclusion of vehicles to a subset of habitable vehicles, they would have been narrow enough to count as ACCA predicates. The majority opinion's discussion in Part II.B supports this point as well: the *Taylor* Court considered *and rejected* a definition such as "building or *occupied* structure." Majority Op. at 7; *see Taylor*, 495 U.S. at 598 & n.8. The Court could have said "building or structure or dwelling." It could have said "building or structure or *other* dwelling." It could have said "building or structure *or other place adapted for overnight accommodation*." But it didn't. It said "building or structure," and that is the definition that we must apply. If the burgled place is not a building or structure, then the burglary is not generic.

B

I would also note that despite *Taylor*'s *references* to the Model Penal Code, it did not *adopt* a definition of burglary "drawn from" the Model Penal Code. *Contra* Dissenting Op. at 34. The Court's "building or structure" definition *approximates* usage from the Model Penal Code, to be sure, but the Model Penal Code's definition of burglary cited in *Taylor* is undoubtedly *broader than generic ACCA burglary*

because it includes burglary of vehicles used only for business purposes:

§ 221.0. Definitions.

In this Article, unless a different meaning plainly is required:

(1) "occupied structure" means any structure, vehicle or place adapted for overnight accommodation of persons, *or for carrying on business therein*, whether or not a person is actually present.

Model Penal Code § 221.0 (Am. Law Inst. 1985) (emphasis added).

§ 221.1. Burglary.

(1) Burglary Defined. A person is guilty of burglary if he enters a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter.

Model Penal Code § 221.1. Thus, for example, under the Model Penal Code, an eleven-year-old's surreptitious entry into the freezer compartment of an unattended Good Humor ice cream truck would be a burglary of an occupied structure.

What *Taylor does* characterize as "practically identical" to its definition of generic burglary is the 1984 definition of burglary from the statute that preceded the ACCA. *Taylor*, 495 U.S. at 598. That statute defined burglary as "any felony consisting of entering or remaining surreptitiously within *a building* that is

property of another with intent to engage in conduct constituting a Federal or State offense." Armed Career Criminal Act of 1984, Pub. L. No. 98-473, § 1803, 98 Stat. 1837, 2185 (emphasis added). No one would argue that "building" in the Armed Career Criminal Act of 1984 had so expansive a meaning as to cover vehicles, even those adapted for the overnight accommodation of persons. Rather, the Court's reference to this statute shows that it had buildings in mind, not "dwellings," when it defined the place of a generic burglary as a "building or structure."

The majority thus rightly determines that *Taylor*'s generic ACCA burglary is *not* Model Penal Code burglary, nor is it "broader" than Model Penal Code burglary (so as to include all Model Penal Code burglaries as a subset), nor is it "broader" than common-law burglary (so as to include all common-law burglaries as a subset). *Taylor*'s description of generic ACCA burglary as including structures "other than dwellings," such as warehouses, in no way requires modifying *Taylor*'s definition to include *all* burglaries of dwellings. *Taylor*, 495 U.S. at 593. Therefore, even if a vehicle outfitted for overnight accommodation is a dwelling, burglary of such a vehicle—according to *Taylor* and its definition drawn from LaFave's treatise—is *not* a generic ACCA burglary, because it is not a burglary of a building or structure.

II

The discussion above presumed that vehicles could be dwellings. But it is at least arguable that no matter how well suited for sleeping, vehicles do *not* fit within the traditional meaning of dwelling, at least for the purposes of the law of burglary. The dissent,

quoting Black's Law Dictionary (10th ed. 2014), would hold that "the traditional meaning of 'dwelling'" includes vehicles so long as they are "used or intended for use as a human habitation." Dissenting Op. at 35.

But Blackstone's Commentaries on the Laws of England—cited by *Taylor*, 495 U.S. at 580 n.3, 593 n.7, as the source of its understanding of common-law burglary—rejects the notion that a tent or a vehicle could be the subject of a burglary:

> "Neither can burglary be committed *in a tent* or booth erected in a market or fair; *though the owner may lodge therein*: for the law regards thus highly nothing but *permanent edifices*; a house or church, the wall, or gate of a town; and it is the folly of the owner to lodge in so fragile a tenement: but *his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted* [i.e., covered] *waggon in the same circumstances*."

4 William Blackstone, Commentaries *226 (emphases added) (footnotes omitted); *see also id.* at *224-26; Sir Edward Coke, 3 *Institutes of Laws of England*, ch. XIV ("A tent or booth in fair or market is not domus mansionalis [a dwelling house that may be the place of a burglary]," even though "every house for the dwelling and habitation of man is taken to be a mansion-house, wherein burglary may be committed."). And, insofar as we seek to determine the traditional common-law understanding of a dwelling, Blackstone beats Black's.

Moreover, the dissent cites the *most recent* edition of Black's Law Dictionary, published in 2014; in earlier editions, however, Black's Law Dictionary defined a dwelling house—again, for the purposes of the law of

burglary—simply as "[a] house in which the occupier and his family usually reside, or, in other words, dwell and lie in." *E.g.*, *Dwelling House*, *Black's Law Dictionary* (rev. 4th ed. 1968).

What the true common-law definition of burglary was—and whether that could include "uncover[ing] a tilted waggon"—is an interesting question, and there are certainly jurisdictions that would adopt the dissent's understanding. But it is not a question for us to decide, for the Supreme Court already consulted these very same sources in deciding *Taylor*, and—at least insofar as the ACCA is concerned—the Supreme Court has made clear that no burglary of a vehicle constitutes generic burglary, not even burglary of a vehicle that serves as a primary residence.

The majority's result here is not, therefore, "contrary" to *Taylor*, as the dissent asserts. Dissenting Op. at 36. Rather, it is *compelled by Taylor*.

III

Admittedly, the Court's ACCA jurisprudence (and our adoption of it) produces bizarre results, some of which the dissent cites. There will be cases where a sentencing court, in applying the categorical approach, must, for example, turn a blind eye to a defendant's prior convictions for burgling houses merely because the applicable burglary statute allows for the *possibility* of conviction for burgling an RV, even if, factually, the court knows full well that the defendant standing before it habitually burgled houses. And Congress, surely, would have wanted to include convictions for burgling houses as ACCA predicates. But we are bound by *Taylor*, and the Court has consistently rein-

forced *Taylor*'s bright-line "building or structure" definition over the past twenty-seven years, as the majority opinion well explains. *See* Majority Op. at 4-5.

Just last year, Justice Alito compared the Court's ACCA jurisprudence to the journey of a Belgian woman who, having set out to pick up a friend at the Brussels train station 38 miles from home, followed her GPS for 900 miles in the wrong direction before realizing—in Zagreb, Croatia—"that she had gone off course," at which point she finally decided to call home. *Mathis*, 136 S. Ct. at 2267 (Alito, J., dissenting). "Along the way from *Taylor* to the present case," Justice Alito wrote, "there have been signs that the Court was off course and opportunities to alter its course. Now the Court has reached the legal equivalent of Ms. Moreau's Zagreb. But the Court, unlike Ms. Moreau, is determined to stay the course and continue on, traveling even further away from the intended destination. Who knows when, if ever, the Court will call home." *Id.* at 2271.

Perhaps the Court will call home soon: it recently vacated and remanded a Fifth Circuit decision for reconsideration where the Fifth Circuit had upheld the use of a conviction under Texas Penal Code § 30.02(a) as a generic ACCA burglary even though the Texas burglary statute incorporates the *very same* definition of "habitation" in Texas Penal Code § 30.01(1) discussed in Part I.A, *supra*. *United States v. Herrold*, 813 F.3d 595 (5th Cir.), *vacated*, 137 S. Ct. 310 (2016). On remand, in a one-page opinion that relies and rests on Fifth Circuit precedent, the Fifth Circuit reaffirmed its holding that Texas burglary of a habitation is an ACCA burglary. *United States v. Herrold*,

No. 14-11317, 2017 WL 1326242 (5th Cir. Apr. 11, 2017) (per curiam). In light of these developments, then, it seems worthy of mention that three decisions cited in the dissent as supporting the Government's position—decisions of the Fifth, Ninth, and Tenth Circuits—are ones that uphold the use of the *very same* Texas burglary statute as generic ACCA burglary. *See United States v. Silva*, 957 F.2d 157, 161-62 (5th Cir. 1992); *United States v. Sweeten*, 933 F.2d 765, 770 (9th Cir. 1991) (per curiam); *United States v. Spring*, 80 F.3d 1450, 1461-63 (10th Cir. 1996); Dissenting Op. at 38.

Moreover, the Eighth Circuit seems recently to have adopted the Supreme Court's understanding of generic ACCA burglary in two decisions in which it held that Wisconsin and Arkansas burglary statutes were broader than generic ACCA burglary. *United States v. Sims*, 854 F.3d 1037, 1040 (8th Cir. 2017) ("[J]ust as it was inconsequential that Wisconsin's statute limited burglary to motor homes, it is inconsequential that Arkansas's statute confines residential burglary to vehicles '[i]n which any person lives' or '[t]hat [are] customarily used for overnight accommodation.' Ark. Code Ann. § 5-39-101(4)(A); *see also United States v. Forrest*, 611 F.3d 908, 913 (8th Cir. 2010) (finding a Colorado burglary statute was categorically broader than generic burglary *because* it covered vehicles adapted for overnight accommodations)." (alterations in original) (emphasis added)); *United States v. Lamb*, 847 F.3d 928, 931 (8th Cir. 2017) (upholding use of Wisconsin burglary conviction as ACCA predicate where the Wisconsin statute was divisible, listing several separate crimes, some of which encompassed "a broader range of conduct than generic burglary as defined in *Taylor*," but where the defendant

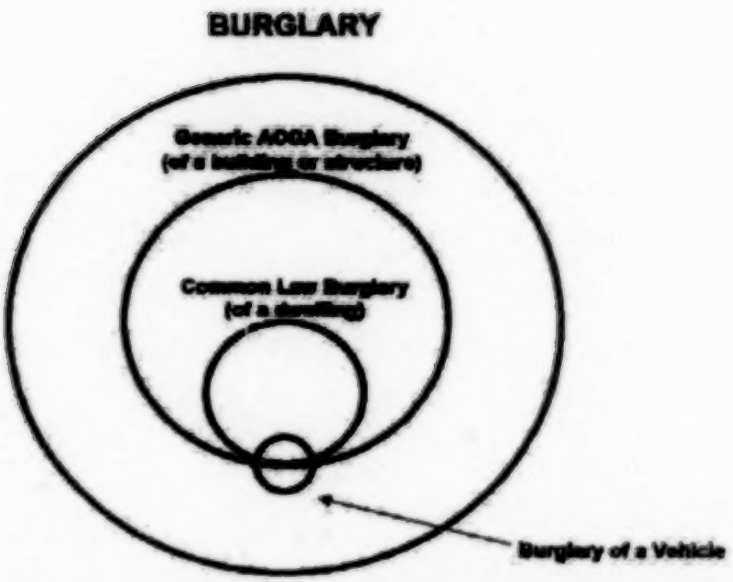
had been convicted under a subsection that was not broader than generic burglary).

Given the similarity between the Texas statute at issue in *Herrold*, *Sweeten*, and *Spring*, and the Tennessee statute at issue here, perhaps the Court will soon clarify the question before us—a question that occupies a significant portion of the federal judiciary's docket. But, until then, it is not incumbent upon us to rewrite the ACCA to include all burglaries of dwellings within its definition of burglary, even if that is what Congress would have wanted.

IV

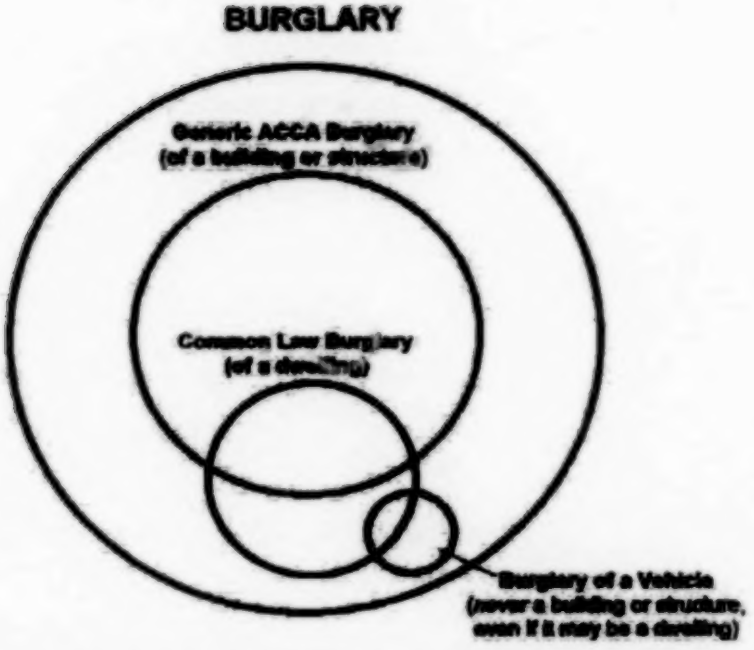
The dissent proposes an "easy way" and a "more complicated way" to resolve this case. What both ways have in common is that they presume, contrary to *Taylor*, that generic ACCA burglary must be a category of burglaries that "extends *beyond*" (so as to *include*) or "encompass[es]" common-law burglary. Dissenting Op. at 33, 34 (first quoting from the easy way, then quoting from the more complicated way).

A simple diagram illustrates the dissent's understanding:



This understanding has a certain appeal and is, admittedly, quite easy to follow—any burglary of a dwelling, whether of a vehicle or otherwise, counts as a generic ACCA burglary, so if a burgled vehicle is a dwelling, then the burglary was a generic ACCA burglary. But elegance is no substitute for accuracy.

Instead, the following diagram more correctly illustrates the Supreme Court's ACCA jurisprudence:



As this diagram indicates, the Supreme Court's test for whether a burglary is a generic ACCA burglary is whether the burgled place is a building or structure, not whether it is a dwelling, although certainly there will be significant overlap between the set of common-law burglaries and the set of generic ACCA burglaries. Having removed the presumption that *every* common-law burglary of a dwelling must be an ACCA burglary, then, it is easier to see that, even if vehicles can be dwellings (which, at common law, they arguably are not—see Part II, *supra*), they are still not buildings or structures, and so their burglary cannot be a generic ACCA burglary.

Perhaps one reason why this is so complicated is that states have defined building or structure to include things that *plainly* are not buildings or structures. *E.g.*, Ariz. Rev. Stat. § 13-1501 (defining "structure," for purpose of Arizona Criminal Trespass and Burglary laws, as "any device that accepts electronic or physical currency and that is used to conduct commercial transactions [e.g., an ATM], any vending machine [e.g., a gumball or other candy machine] or any building, object, vehicle, railroad car or *place with sides and a floor* . . . used for lodging, business, transportation [e.g., a red Radio Flyer wagon], recreation [e.g., a jai alai court] or storage [e.g., a rolling garbage bin]" (emphasis added)); Haw. Rev. Stat. § 708-800 (providing no definition for "structure," but defining "building" as "any structure, and the term also includes any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein"). In Arizona, then, "structures" would include such devices as credit-card payment terminals and such places as a swimming pool or a horse's trough. And in Hawaii, a state that is no stranger to red-eye flights, an aircraft—perhaps depending on how well its first-class cabin is suited for overnight accommodation—may evidently be a flying "building," for purposes of the criminal burglary laws.

But even if state legislatures, in classifying various places or objects as buildings or structures, have not always meant what they have said, presumably the Supreme Court *has*—and presumably the Supreme Court also meant what it said *about meaning what it says*. I therefore concur in the majority's opinion, even if, as the dissent charges, I thereby risk "mak[ing] the mistake of reading [a Supreme Court opinion] like a statute." Dissenting Op. at 36.

CONCURRENCE

HELENE N. WHITE, Circuit Judge, concurring. I concur in the majority's and Judge Boggs's opinions. I write separately to respond to the dissent's assertions regarding the common law.

As the majority observes, Congress originally defined burglary in the ACCA as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." *Taylor v. United States*, 495 U.S. 575, 581(1984) (quoting 18 U.S.C. § 1202(c)(9)). There is no question that if Congress had retained this original definition, which applied only to buildings, the challenged Tennessee statutory language—including both vehicles and tents —would not qualify as generic. Faced with the unexplained omission of the statutory definition, the *Taylor* Court opted to define generic burglary as involving a "building or structure," rather than just a building, but rejected definitions of burglary that include "places, such as automobiles . . . other than buildings." *Id.* at 599. The dissent concludes that in doing so, the Court did not intend to exclude dwellings that are not buildings or structures. We know this, according to the dissent, because "*Taylor* told us that common-law burglary *always* qualified as a violent felony under the Act." And, because "the 'habitations' covered by the Tennessee aggravated burglary statute qualify as dwellings under the common-law definition of burglary," Tennessee aggravated burglary is generic burglary covered by the ACCA.

But the dissent's basic premise—that tents and vehicles were covered by the common law—is incorrect.[1] *Black's Law Dictionary* is not the standard for defining the common law. Neither are state-court decisions interpreting the term "dwelling." Rather, Blackstone and similar treatises are the standard references for the common law. *See Taylor*, 490 U.S. at 593 n.7; *see also McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 594-95 (2008).

According to Blackstone, only permanent structures can be the subject of burglary:

> Neither can burglary be committed in a tent or booth erected in a market or fair; *though the owner may lodge therein*: for the law regards thus highly nothing but permanent edifices; a house, or church, the wall or gate of a town and though it may be the choice of the owner to lodge in so fragile a tenement, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances.

4 William Blackstone & St. George Tucker, Blackstone's Commentaries 225 (1803) (emphasis added). Similarly, William Hawkins's Treatise of Pleas of the Crown states:

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[1] The dissent at times refers to the "traditional meaning" of dwelling, rather than the common-law meaning. Because the *Taylor* Court referred to "the traditional common-law definition," 495 U.S. at 580, and the dissent does not otherwise discuss the common-law definition of "dwelling," I assume no distinction is intended.

> From what has been said it clearly appears, That no Burglary can be committed by breaking into any Ground inclosed, or Booth, or Tent, &c. for there seems to be no Colour from any Authority ancient or modern, to make Offence Burglary that is not done either against some House, or Church, or the Walls, or Gates of some Town.

104 (3d ed. 1739). Further, in his leading 19th-century American treatise, Wharton defined dwelling-house as "any permanent building in which a party may dwell and lie, and as such, burglary may be committed in it," and agreed that burglary "cannot be committed in a tent or booth in a market or fair, *even although the owner lodge in it*; because it is not a permanent but a temporary edifice." 2 Francis Wharton, A Treatise on the Criminal Law of the United States 369 §§ 1568, 1570 (6th ed. 1868) (emphasis added).

The evolution of Tennessee's burglary statute confirms that common-law burglary did not include tents or vehicles. Tennessee's earliest burglary statute defined burglary as "the breaking and entering into a mansion house by night with intent to commit a felony." 1829 Tenn. Pub. Acts 30. This mirrored the common-law definition of burglary, which did not include movable structures. *See* 1 Sir Edward Coke, The Third Part of the Institutes of the Laws of England 63 (15th ed. 1797) ("A burglar . . . is by the common law a felon, that in the night breaketh and entreth into a mansion house of another" with intent to commit a felony). It was not until 1885 that Tennessee's burglary statute was expanded and began to resemble its modern-day statute. In 1885, Tennessee expanded its burglary definition to include railroad cars: "[w]ho-

ever shall break and enter into any freight or passenger car, either in the daytime or night time, within this State, with intent to steal therefrom anything of value, or to commit a felony of any kind . . . shall be guilty of burglary[.]" 1885 Tenn. Pub. Acts 66-67. This and all future expansions of the statute were clear departures from common-law burglary, as freight and passenger cars were not encompassed by the common-law definition of "breaking and entering into a mansion house."

The dissent argues that references to scholars such as Blackstone are obsolete because the common-law has evolved over time, and by 1984—the year the ACCA was enacted—most states considered vehicles and tents to be dwellings. First, the *Taylor* Court rejected the dissent's method of analysis, explaining that "[t]he word 'burglary' has not been given a single accepted meaning by the state courts" and that Congress did not intend to define predicate offenses based on "technical definitions and labels under state law." 495 U.S. at 580, 590. Second, for its state-common-law proposition, the dissent cites *Kanaras v. State*, 460 A.2d 61, 70-71 (Md. Ct. Spec. App. 1983). Even under *Kanaras*, however, Tennessee's aggravated-burglary statute would be broader than common-law burglary. In *Kanaras*, Maryland's Court of Special Appeals determined that a vehicle constituted a "dwelling-house" only if it was a "regular place of abode." *Id.* at 69. It explained that "[g]enerally, a vehicle-type structure, used as a vehicle primarily for transportation purposes, should not be regarded as a dwelling house, even if occasionally used for sleeping." *Id.* Tennessee's aggravated-burglary statute draws no such distinction. Rather, its definition of "habitation" includes a "vehicle that is designed

or adapted for the overnight accommodation of persons," and it also includes all tents without qualification. Tenn. Code Ann. § 39-14-401(1)(A), (B). Thus, under Tennessee law, a tent or a vehicle adapted for overnight use can be burglarized, even if never actually used as a "regular place of abode." *Kanaras* shows at most that it was *possible* under state common law that a tent or vehicle would constitute a dwelling.

Further, state common law did not *categorically* consider tents and vehicles, even when designed for the overnight accommodation of persons, to be dwellings. The dissent cites *Kanaras* as "collecting cases" supporting the proposition that state courts "classify burglaries of motor homes and camping tents as burglaries of dwellings." Dissenting Op. at 35. *Kanaras* does no such thing. In all, *Kanaras* string cites sixteen cases for the idea that "a vehicle such as the Shasta [Winnebago]" could "be considered as a dwelling house." 460 A.2d at 69. Of these sixteen cases, eight of them do not involve burglary. *See, e.g., Copley v. Rona Enterprises, Inc.*, 423 F. Supp. 979 (S.D. Ohio 1976) (a federal court interpreting "dwelling" under the Truth in Lending Act). Three others considered burglary of mobile homes that were neither self-propelled vehicles nor tents. *See, e.g., State v. Ryun*, 549 S.W.2d 141, 142 (Mo. 1977) ("It is a typical mobile home, detached from the tow vehicle by which it may be moved. It has a 'skirt' from the floor level to the ground to block air passage under the floor, and is connected to an electricity transmission line."). Two others involved the interpretation of burglary statutes that omitted "dwelling" from their definitions of burglary, and the courts instead considered whether a tent or a "movable sheep wagon" constituted a "building" or a "house." *See,*

e.g., *State v. Ebel*, 15 P.2d 233, 234 (Mt. 1932) ("Common-law 'burglary' is defined as the breaking and entering of the dwelling of another . . . but the controlling definition here is: 'Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, railroad car . . . Here we have 'a structure which has walls on all sides and is covered by a roof'—a house, a building."). Thus, only three of the sixteen cases support the dissent's proposition, and these include two cases from the same Texas court, *see Luce v. Slate*, 81 S.W.2d 93 (Tex. Crim. App. 1935); *Martin v. State*, 57 S.W.2d 1104 (Tex. Crim. App. 1933), and one case, *United States v. Lavender*, 602 F.3d 639 (4th Cir. 1979), from a federal court of appeals that has since "adopted a 'no-vehicles-or-tents' definition." Dissenting Op. at 38; *United States v. White*, 836 F.3d 437, 445-46 (4th Cir. 2016).

Rather than a change in state *common* law, the inclusion of tents and vehicles in state burglary law reflects the expansion of state ***statutory*** law. Indeed, *Ebel* explains as much, concluding that a movable sheep wagon was a "house" and a "building" under Montana's burglary statute because the statute, unlike the common law, required only that a structure have "walls on all sides and [was] covered by a roof" to be capable of being burgled. 15 P.2d at 234. Similarly, the California Supreme Court explained that California's definition of burglary expanded to include tents and other movable structures because of a change in state statutory law, not state common law:

> The first definition of the [burglary] offense found in our statute abolishes all the nice distinctions of

> the common law by the use of this language: 'Any dwelling house, or any other house whatever, *or tent, or vessel or other water craft*'—language broad enough to include buildings of any kind and used for any purpose. . . . [T]he absence of more particular terms of description indicates an intention, on the part of the Legislature, to include every kind of building or structures 'housed in' or roofed, regardless of the fact whether they are at the time, or ever have been, inhabited by members of the human family.

People v. Stickman, 34 Cal. 242, 245 (Cal. 1867) (emphasis added). Thus, the dissent's view of the common law is unsupported no matter when one considers the proper reference point to the common law to be.

Additionally, the dissent's assertion that Michigan's home-invasion statute and Kentucky's second-degree burglary statute apply to common-law dwellings is unsupported. The Michigan home-invasion statute defines dwelling as "a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." Mich. Comp. Laws. § 750.110a(1)(a). That this definition is broader than the common law becomes clear when one looks at Michigan's 1837 burglary statute, which adopted the common-law definition and criminalized "break[ing] and enter[ing] any dwelling-house in the night time" with the intent to commit a felony. 1837 Mich. Pub. Acts 627. In applying this definition of burglary, Michigan's Supreme Court explained that "[t]he statutory definition of burglary in a dwelling-house, is the same as that of the common law," and looked to Blackstone's Commentaries for the definition of a dwelling-house. *Pitcher v. People*, 16 Mich.

142, 146 (1867). It is true that, as the dissent observes, we have held that Michigan's home-invasion statute, which proscribes breaking and entering a dwelling with the intent to commit a crime, constitutes generic burglary. *United States v. Quarles*, 850 F.3d 836, 840 (6th Cir. 2017). However, in doing so, we explained that "it would be a stretch, rather than a realistic probability, that a tree, vehicle, boat, outcropping of rock, cave, bus stop, or suspended tarp would be considered a 'home.'" *Id.* at 839. We concluded that the home-invasion statute constitutes generic burglary because it covers no more than buildings and structures, not because its definition comported with common law.

Kentucky's second-degree burglary statute similarly does not apply to common-law dwellings. This statute defines burglary in the second degree as "with the intent to commit a crime, [a person] knowingly enters or remains unlawfully in a dwelling." Ky. Rev. Stat. § 511.030. However, the cases finding the Kentucky second-degree burglary statute to be generic made the same mistake we made in *Nance*—these unpublished opinions failed to look to the statutory definition of "dwelling." *See United States v. Moody*, 634 F. App'x 531, 534 (6th Cir. 2015); *United States v. Jenkins*, 528 F. App'x 483, 485 (6th Cir. 2013). Although Kentucky defines "dwelling" as "a building which is usually occupied by a person lodging therein," Ky. Rev. Stat. § 511.010(2), the statute further provides that "'[b]uilding, in addition to its ordinary meaning, means any structure, vehicle, watercraft or aircraft: (a) Where any person lives; or (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation." Ky. Rev. Stat.

§ 511.010(1). Thus, Kentucky's definition of a "dwelling" includes vehicles, watercraft, and aircraft, and is thus broader than the common-law meaning of dwelling.

It is clear that the common law, regardless of continent or century, did not consider a tent as a dwelling that could be the subject of burglary. And, although no account of the common law discusses mobile homes and self-propelled vehicles for obvious reasons, it is apparent that the common law would not have regarded such places of habitation as permanent edifices worthy of protection as a dwelling. Thus, I reject two basic premises of the dissent's reasoning—that the habitations covered by the Tennessee statute qualify as dwellings under the common-law definition of burglary, and that because *Taylor* includes common-law burglary as a subset of generic burglary, all dwellings are covered by generic burglary.

The dissent leaps from the *Taylor* Court's inclusion of all common-law burglary in generic burglary to the conclusion that common-law burglary covers all dwellings and habitations. "The greater includes the lesser. No matter how far the federal definition of 'burglary' extends *beyond* the common law definition—by eliminating, say, the requirement that the burglary occur at night or by expanding the kinds of structures involved to cover an office building or a shed—it still covers the Tennessee law, which focuses on burglaries of dwellings or habitations. Burglary of a dwelling in its many forms, including each of the forms identified in the Tennessee law, is always a federal burglary." Dissenting Op. at 33. "By noting that modern burglary covers structures *other than dwellings*, the Court made clear that the phrase 'building or structure' in its

definition of burglary includes all dwellings. 'Structure' is the broader category; 'dwelling' is a subset." Dissenting Op. at 34. But the *Taylor* Court said no such thing. The *Taylor* Court never addressed the definition of dwelling, and never stated that either common-law or generic burglary includes all dwellings. Thus, the dissent's assertion that "*Taylor* told us that common law burglary always qualified as a violent felony under the Act" is correct, but its import is simply that breaking and entering a dwelling house during the night with intent to commit larceny is generic burglary.

I do not disagree that the outcome of today's decision leads to some puzzling results. But, as the dissent impliedly recognizes, the unsatisfactory outcomes in this area are the product of the combined effect of the requirements that we must (1) look to the elements of the offense, not the facts of the particular case, and (2) we may not look beyond the elements if a statute is indivisible. If the results are unsatisfying, we must accept them until Congress changes the ACCA or the Supreme Court its interpretation of it. Further, the dissent's approach leads to its own puzzling outcomes. A defendant who reached into someone else's unoccupied tent while camping and grabbed a granola bar would be subject to an ACCA enhancement; but a defendant who disassembled a tent and stole it and all its contents without entering it would not. And a defendant could steal a tent while it is collapsed and therefore not capable of being entered, bring it home, pitch it, enter it with the intent to use a computer to steal funds from a bank account, and be subject to the ACCA enhancement. A defendant who opened the door of a seemingly unoccupied vehicle hoping to find spare change, and then fled when confronted by the owner

who used the car as his home, would be subject to the ACCA; but a defendant who knew the car contained all the owner's possessions, waited for the owner to leave the car, then stripped it and stole all its contents would not be.

Whether Tennessee's aggravated-burglary offense and similarly-defined offenses fall within Congress's concept of generic burglary is a more difficult question. Persuasive arguments can and have been made on both sides. For me, the Model Penal Code's expansive definition of "occupied structure" provides the strongest support for the dissent. However, the majority's and Judge Boggs's thorough discussions of *Taylor* and the Supreme Court's consistent rejection of vehicles as a subject of generic burglary and emphasis on "buildings and other structures," leads me to agree that generic burglary does not include such temporary structures as tents and vehicles, even when used as a habitation.

DISSENT

SUTTON, Circuit Judge, dissenting. There is an easy way to think about this case. And there is a more complicated way. Either way, Stitt's conviction under Tennessee law for aggravated burglary counts as a "burglary" under the Armed Career Criminal Act.

The easy way. The Armed Career Criminal Act establishes a mandatory minimum sentence for firearm offenders who have three previous convictions for "violent felon[ies] or [] serious drug offense[s]." 18 U.S.C. § 924(e)(1). The Act lists "burglary" as a qualifying violent felony. *Id.* § 924(e)(2)(B)(ii). The relevant portion of Tennessee's aggravated burglary statute applies to burglary of a "habitation," defined as "any

structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons," including "a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant." Tenn. Code § 39-14-401(1)(A), (B).

Aggravated burglary under Tennessee law counts as a crime of violence for three reasons.

One: Congress meant to use "burglary" in a way that goes beyond the common law definition of burglary: "breaking and entering of a dwelling at night, with intent to commit a felony." *See Taylor v. United States*, 495 U.S. 575, 592-94 (1990).

Two: The "habitations" covered by the Tennessee aggravated burglary statute qualify as dwellings under the common law definition of burglary.

Three: The greater includes the lesser. No matter how far the federal definition of "burglary" extends *beyond* the common law definition—by eliminating, say, the requirement that the burglary occur at night or by expanding the kinds of structures involved to cover an office building or a shed—it still covers the Tennessee law, which focuses on burglaries of dwellings or habitations. Burglary of a dwelling in its many forms, including each of the forms identified in the Tennessee law, is always a federal burglary. That's all anyone needs to know.

The more complicated way. The same conclusion applies even if we account for a few more perspectives and concepts: the categorical versus modified categorical approaches, divisible versus indivisible statutes,

and generic versus non-generic definitions of crimes. *Taylor* sought to provide a uniform definition of "burglary" for federal courts to measure state criminal statutes. *Id.* at 599. In doing so, it declined to limit its definition of burglary to "the traditional common-law definition"—"breaking and entering of *a dwelling* at night, with intent to commit a felony"—and opted instead for a "*broader* 'generic' definition" drawn from the Model Penal Code: "unlawful or unprivileged entry into, or remaining in, *a building or structure*, with intent to commit a crime." *Id.* at 580, 592, 599 (emphases added).

The Court explained that the modern definition encompassed the common law crime: "Whatever else the Members of Congress might have been thinking of, they presumably had in mind at least the 'classic' common-law definition when they considered the inclusion of burglary as a predicate offense." *Id.* at 593. The Court repeatedly described the common law definition as "narrow," *id.* at 595, 596, and said that it constituted a "subclass" of modern burglary, *id.* at 598. The problem with sticking to the common law definition was that most States had "expanded" on the definition, including "entry without a 'breaking,' structures other than dwellings, offenses committed in the daytime" and other new, more expansive elements. *Id.* at 593. By noting that modern burglary covers structures *other than dwellings*, the Court made clear that the phrase "building or structure" in its definition of burglary includes all dwellings. "Structure" is the broader category; "dwelling" is a subset. The Court even said that when "a statute is narrower than the generic view, *e.g.*, in cases of burglary convictions in common-law States . . . there is no problem." *Id.* at 599.

That's this case, which is why there is no problem here either. The Tennessee law, to repeat, defines "habitation" as "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons," including "a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant." Tenn. Code § 39-14-401(1)(A), (B). This definition of aggravated burglary readily qualifies as burglary of a dwelling and thus as "burglary" under federal law for several reasons.

The Tennessee definition mirrors the definition of "occupied structure" in the Model Penal Code's burglary statute, on which *Taylor* based its understanding of the elements of generic burglary. *See Taylor*, 495 U.S. at 580, 598 n.8; American Law Institute, Model Penal Code § 221.0(1).

The Tennessee definition matches the traditional meaning of "dwelling." *Black's Law Dictionary* defines "dwelling house," in the criminal context, as "[a] building, a part of a building, a tent, a mobile home, or another enclosed space that is used or intended for use as a human habitation." *Id.* at 619 (10th ed. 2014). State courts agree. They classify burglaries of motor homes and camping tents as burglaries of dwellings. *See, e.g.*, *People v. Trevino*, 1 Cal. App. 5th 120, 125 (2016) (holding that a recreational vehicle was an "inhabited dwelling house"); *People v. Wilson*, 11 Cal. App. 4th 1483, 1489 (1992) (holding that a camping tent was an "inhabited dwelling house"); *Kanaras v. State*, 460 A.2d 61, 70-71 (Md. Ct. Spec. App. 1983) (collecting

cases). To my knowledge, there is no contrary state authority.

The federal courts have unanimously held that burglary of a *dwelling* covers vehicles and tents *that are designed for human habitation*. Until August 1, 2016, the Sentencing Guidelines included "burglary of a dwelling" as an enumerated offense in the definition of "crime of violence." U.S.S.G. § 4B1.2 (2015). Consistent with *Taylor*'s conclusion that burglary of a dwelling is a subset of generic burglary of a building or structure, the Commission's original commentary noted that "[c]onviction for burglary of a dwelling would be covered; conviction for burglary of *other structures* would not be covered." U.S.S.G. § 4B1.2 cmt. n.1 (1987) (emphasis added). All courts of appeals that interpreted this provision on its own terms held that statutes that criminalized burglary of tents and vehicles (such as RVs) adapted for overnight accommodation qualified as burglary of a dwelling. *See, e.g.*, *United States v. Ramirez*, 708 F.3d 295, 303 (1st Cir. 2013) (any "enclosed space for use or intended use for human habitation" is a dwelling); *United States v. Murillo-Lopez*, 444 F.3d 337, 342, 345 (5th Cir. 2006); ("dwelling" encompasses "tents and vessels used for human habitation"); *United States v. Graham*, 982 F.2d 315, 316 (8th Cir. 1992) (per curiam) (using definition from *Black's*); *United States v. Rivera-Oros*, 590 F.3d 1123, 1132-33 (10th Cir. 2009) (same); *United States v. Garcia-Martinez*, 845 F.3d 1126, 1132 (11th Cir. 2017) (vehicles "used or intended for use for human habitation" are dwellings).

All in all, *Taylor* tells us that burglary of a dwelling is always generic, and a uniform body of precedent tells

us that Tennessee's definition of "habitation" applies only to dwellings. The outcome should be clear. The statute is generic. Stitt's conviction qualifies as a violent felony.

In reaching a contrary conclusion, the court points to several statements in Supreme Court opinions and, with respect, makes the mistake of reading an opinion (in truth part of an opinion) like a statute. *Taylor* observed that some state burglary statutes go beyond the generic definition by "eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings." 495 U.S. at 599. The Court gave one example of such a statute: a Missouri law that criminalized breaking and entering into "any booth or tent, or any boat or vessel, or railroad car." *Id.* at 593. The Court repeated that burglary is a violent felony under the Act "only if committed in a building or enclosed space . . . not in a boat or motor vehicle." *Shepard v. United States*, 544 U.S. 13, 15-16 (2005). And it said the same thing in *Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016).

But these statements do not undermine *Taylor*'s conclusion that dwellings categorically remain structures and thus that burglary of a dwelling remains categorically generic. Just look at the context of each statement. The Missouri statute discussed in *Taylor* applied to *any* tent or boat, including a canoe or a tent for an outdoor party, not just those tents or boats used for habitation. So too of the law in *Shepard*, which applied to any "building, ship, vessel, or vehicle." 544 U.S. at 31. And of the law in *Mathis*, which applied to any "land, water, or air vehicle." 136 S. Ct. at 2250.

These statutes covered *all* vehicles, and so were clearly not generic under *Taylor* because they did not apply to dwellings—namely places used for habitation. The Court had no reason to consider recreational vehicles and houseboats when deciding *Taylor* or any case since, and thus no reason to consider that some vehicles (but not all vehicles) count as dwellings under the common law definition.

The court's decision not only goes beyond what *Taylor/Shepard/Mathis* require. It also contradicts *Taylor*'s reasoning. The court's decision stands for the proposition that simple common-law burglary—"breaking and entering into a dwelling, with intent to commit a felony"—is not generic when it comes to state courts that follow the long-held custom of treating vehicles and tents adapted for overnight accommodation as dwellings. How can that be? *Taylor* told us that common law burglary *always* qualified as a violent felony under the Act. 495 U.S. at 599. If the court is correct, generic burglary now goes beyond the common law crime but never includes it.

In this circuit alone, the majority's holding jeopardizes two statutes previously treated as generic. Consider Michigan's home invasion statute, which applies to a common law "dwelling," Mich. Comp. Laws § 750.110a, and Kentucky's second-degree burglary statute, which does the same, Ky. Rev. Stat. § 511.030. We previously treated convictions under the former as a violent felony, *United States v. Quarles*, 850 F.3d 836, 839-40 (6th Cir. 2017), and did the same for the latter, *United States v. Moody*, 634 F. App'x 531, 534-35 (6th Cir. 2015).

The majority's holding also produces this head-scratching outcome—that Tennessee's lesser crime of "burglary of a building" qualifies as generic burglary while aggravated burglary does not. A similar oddity arises within the aggravated burglary statute itself under the court's decision. It's okay if the statute covers burglary of unoccupied structures, such as tool sheds, *see United States v. Lara*, 590 F. App'x 574, 579 (6th Cir. 2014), but not if it covers places where people regularly lodge. How likely is that? That Congress meant to classify burglaries of unoccupied structures as violent felonies but not the burglary of a sleeping family's RV?

The court responds that we should concentrate on "a place's form and nature—not its intended use or purpose—when determining whether a burglary statute's locational element is a 'building or other structure.'" Maj. Op. 4. But form follows function, making it impossible for *any* definition of burglary to avoid functional considerations. Bridges, cranes, gazebos, and doll houses are all "structures," but the court would not claim that stealing from any of these locations would qualify as burglary. A would-be burglar cannot "break and enter" into those structures because, as a matter of function, they're not designed to house people and property securely. If anything, determining what structures a person can break into and enter seems to be a more difficult functional question than determining what structures are designed for human accommodation.

But all of this distracts from the key point: We should not isolate three words from *Taylor*, lift them from their context, and in the process eliminate com-

mon law burglary of a dwelling, which *Taylor* tells us in no uncertain terms is the heart of the crime.

The court claims that five courts of appeals have followed its approach and just one has gone the other way. That is not quite right. To my knowledge, only six courts of appeals have considered statutes that, like Tennessee's, apply only to vehicles and tents that serve as dwellings. In addition to our decision in *United States v. Nance*, 481 F.3d 882, 887 (6th Cir. 2007), two other courts of appeals have adopted the dwelling definition, holding that burglary statutes covering vehicles and tents designed for overnight accommodation are generic under *Taylor*. *United States v. Silva*, 957 F.2d 157, 162 (5th Cir. 1992); *United States v. Spring*, 80 F.3d 1450, 1461-63 (10th Cir. 1996). Three other courts, it is true, have adopted a "no-vehicles-or-tents" definition. *See United States v. Henriquez*, 757 F.3d 144, 149 (4th Cir. 2014); *United States v. Sims*, 854 F.3d 1037, 1039 (8th Cir. 2017); *United States v. Cisneros*, 826 F.3d 1190, 1193-94 (9th Cir. 2016). But all three decisions come with qualifications. One comes with internal disagreement within the case itself. *Henriquez*, 757 F.3d at 151-55 (Motz, J., dissenting) (concluding that burglary of a common law dwelling is always generic). The other two are at odds with decisions from the *same* court, including one decision that involves this *same* Tennessee statute, *see United States v. Pledge*, 821 F.3d 1035, 1037 (8th Cir. 2016) (holding that Tennessee aggravated burglary is generic); *United States v. Sweeten*, 933 F.2d 765, 771 (9th Cir. 1991) (per curiam) (holding that Texas's identical statute was generic).

The stakes of this debate have grown since *Mathis*. Before *Mathis*, many courts made liberal use of the "modified categorical approach," which enabled courts to look at certain records from a prior conviction under a non-generic statute to determine whether the defendant, to use one example, in fact burglarized a home or a vehicle. *See* 136 S. Ct. at 2249. This meant that declaring a statute non-generic carried few consequences; a court often could proceed to figure out what the defendant in fact did. But *Mathis* made clear that the modified categorical approach applies only when a statute contains multiple alternative elements and therefore defines separate, divisible crimes. *Id.* at 2249-50. A statute that merely lists different means of commission—such as burglarizing a building, vehicle, or tent—is not divisible. Now, when a court declares a statute like Tennessee's non-generic, that's all there is to it. Because aggravated burglary in Tennessee can apply to the burglary of a motor home, no one convicted under the statute has committed "burglary" for purposes of the Armed Career Criminal Act.

Nor is Tennessee an outlier. The majority's no-vehicles-or-tents rule implies that *every state's basic burglary statute is non-generic*. *See* Appellee's Supp. Br., App'x B. It's a strange genus that doesn't include any species. In combination with *Mathis*, the majority's definition of generic burglary effectively reads "burglary" out of the Act. That should give us all pause.

My concurring colleagues contest one of my premises. They claim that tents (and perhaps vehicles) could never be dwellings under the common law, meaning that Tennessee aggravated burglary is not generic

even under my reading of *Taylor*. I disagree. The cited authorities from the ancient common law, Blackstone among others, go out of their way to point out that tents erected in public markets are not dwellings. They do not consider whether tents designed for human accommodation might qualify—the only claim I make here and the only reason a tent could be a dwelling under the common law.

But this argument has a broader problem: a mistaken vantage point. Blackstone and other treatise writers may be good guides to the state of the common law in their own centuries. But the very nature of the common law is that it's *never* static. That is its reason for being: It allows courts to make new law to address new circumstances. And that's why some judges complain when courts use a common-law method of interpretation in construing the Constitution or statutes. *See generally* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and its Laws*, *in* A Matter of Interpretation (1997). For our purposes, the proper vantage point is the meaning of the (everevolving) common law in 1984, when Congress enacted the Armed Career Criminal Act. By then, the consensus of the state courts—the true authorities on American common law—was that tents and vehicles designed and used for human accommodation count as dwellings. *See Kanaras*, 460 A.2d at 70-71 (collecting cases); *Martin v. State*, 57 S.W.2d 1104, 1104 (Tex. Crim. App. 1933) ("That a tent may be a house within the meaning of the law is not open to serious question."); *Knowles v. State*, 98 So. 207, 208 (Ala. Ct. App. 1923) (acknowledging that a tent, depending upon its construction and use, may be a "dwel-

ling house"). *Black's Law Dictionary* accounted for this consensus by altering its definition of "dwelling" to include tents and vehicles in 1979. *See id.* at 454 (5th ed.). The Model Penal Code of 1980 also reflected this widely shared understanding. And so did the pertinent state statutes. Let them live in "mansion houses" may have been an answer to those who wanted the protection of the burglary laws for lesser dwellings a long time ago. But that has not been true for many decades.

All of this leads to one conclusion. In 1984, when Congress used the word "burglary" in ACCA, and in 1990, when *Taylor* construed the term to include the common law definition—"breaking and entering of a dwelling at night"—there was no question that tents and vehicles designed and used for human accommodation qualified as dwellings.

To their credit, my concurring colleagues recognize the strange results that follow from their adherence to the "bright-line" rule that burglary of anything besides a "building or structure" can never be generic. *See* Concurring Op. (Boggs, J.) at 20. As noted, that definition nearly renders generic burglary a null set. My colleagues assign the blame for this state of affairs to the *Taylor* Court. But we should give the Court and Congress more credit. The result the court reaches today only follows from *Taylor* if one reads "building or structure" as if it "were a statutory term." *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2446 (2013). We should instead adopt "the interpretation that best fits within the highly structured framework that [*Taylor*] adopted." *Id.*

That framework tells us burglary of a dwelling is always generic, regardless of whether the dwelling is made of "stone, steel, or cloth." *People v. Netzik*, 383 N.E.2d 640, 642-43 (Ill. App. Ct. 1978). Whether a suburban home, an apartment, an RV, or a tent under a highway, all of these structures are designed for habitation. And all burglaries of them are covered. Holding otherwise hollows out generic burglary by removing the crime's common law core. I would stand by our decisions in *Nance* and *United States v. Priddy*, 808 F.3d 676, 684 (6th Cir. 2015), which avoided each of these pitfalls and correctly resolved this issue.

For these reasons, I respectfully dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 14-6158

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

VICTOR J. STITT, II, DEFENDANT-APPELLANT

On Appeal from the United States District Court
for the Eastern District of Tennessee

Filed: Feb. 10, 2016

BEFORE: MOORE and COOK, Circuit Judges; PEARSON, District Judge.*

COOK, Circuit Judge. After Victor Stitt pulled a gun on his girlfriend, a jury convicted him of being a felon in possession of a firearm. He appeals, challenging the denial of his motion to suppress, venue in the Eastern District of Tennessee, and his sentence enhancement under the Armed Career Criminal Act (ACCA). Finding no error, we AFFIRM his conviction and sentence.

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* The Honorable Benita Y. Pearson, United States District Judge for the Northern District of Ohio, sitting by designation.

I.

In 2011, Stitt lived with his girlfriend Rebecca Hostetler in Coffee County in the Eastern District of Tennessee. During an argument, Stitt retrieved a firearm, tried to stick it in Hostetler's mouth, and threatened to kill her. When a neighbor intervened, Hostetler left, and Stitt asked another woman to drive him to his mother's home in Cannon County in the Middle District of Tennessee. The neighbor told the police that Stitt and the other woman left in a champagne-colored car.

Coffee County detectives responded to a dispatch reporting a domestic-violence incident and directing them to Stitt's mother's address. The detectives drove their unmarked car to the end of the driveway and saw the champagne-colored car in the backyard. They also saw Stitt standing at the backdoor of his mother's trailer. He fled, and the detectives chased him around both sides of the trailer. Trapped, Stitt surrendered. A .22 caliber handgun lay within arm's reach of Stitt on the ground.

A grand jury indicted Stitt on one count of being a felon in possession in violation of 18 U.S.C. § 922(g). Stitt moved to suppress evidence of the firearm, claiming that the detectives breached the trailer's constitutionally protected curtilage before spotting him at the backdoor. After a hearing, a report and recommendation, and objections, the district court denied the motion.

A jury then convicted Stitt on the felon-in-possession charge. Because Stitt's presentence report identified nine "violent felony" convictions under ACCA, the

court—over Stitt's objection—labeled him an armed career criminal and imposed a within-guidelines sentence of 290 months of imprisonment.

Stitt now appeals.

II.

Stitt first claims that the district court erred in denying his motion to suppress. He argues that the end of the driveway—where the detectives stopped their car—constituted curtilage. By entering this constitutionally protected area, the detectives violated Stitt's Fourth Amendment rights, and the court should have suppressed the evidence the detectives subsequently seized.

We review the district court's findings of fact for clear error but give de novo review to its conclusions of law. *United States v. Ray*, 803 F.3d 244, 275 (6th Cir. 2015). "A factual finding is clearly erroneous when 'a court, on reviewing the evidence, is left with the definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *United States v. Gunter*, 551 F.3d 472, 479 (6th Cir. 2009)).

Curtilage includes "the area around the home to which the activity of home life extends." *Daughenbaugh v. City of Tiffin*, 150 F.3d 594, 598 (6th Cir. 1998) (quoting *Oliver v. United States*, 466 U.S. 170, 182 n.12 (1984)). Four factors govern the classification of an area as curtilage:

> [1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps

> taken by the resident to protect the area from observation by people passing.

Id. (quoting *United States v. Dunn*, 480 U.S. 294, 301 (1987)). Analyzing these factors assists us in determining whether an individual "reasonably may expect that the area in question should be treated as the home itself," *i.e.*, as a place in which the individual reasonably may expect privacy. *Dunn*, 480 U.S. at 300.

The end of the driveway, or turnaround, stood in close proximity to the trailer, suggesting that Stitt reasonably could expect privacy there. *See, e.g.*, *Widgren v. Maple Grove Twp.*, 429 F.3d 575, 582 (6th Cir. 2005) (finding a cleared area four to six feet away from the house was curtilage).

But proximity alone does not suffice, and the other factors weigh against a finding of curtilage. The public could view and access the turnaround from the street, undermining Stitt's expectation of privacy. *See, e.g.*, *United States v. Galaviz*, 645 F.3d 347, 356 (6th Cir. 2011) (finding no expectation of privacy when the defendant took no steps "to protect the driveway from observation by passersby"). And though the property boasted a fence, the driveway lay outside the fence, and no gate blocked the entrance. *Id.* (concluding that the defendant lacked any expectation of privacy when the driveway was not enclosed by a fence or other barrier). Finally, the family's use of the turnaround reinforced its non-private nature. Testimony established that visitors parked cars in the turnaround —decidedly not an activity associated with the privacies of life. *Compare United States v. Estes*, 343 F. App'x 97, 101 (6th Cir. 2009) (finding that the use of a driveway as a "point of entry into the residence" "undercut a

finding that the driveway represents curtilage"), *with Pritchard v. Hamilton Twp. Bd. of Trs.*, 424 F. App'x 492, 499 (6th Cir. 2011) (finding that a backyard used for swimming could reasonably be expected to be private). Taken together, the factors suggest that Stitt lacked a reasonable expectation of privacy in the turnaround, and the turnaround therefore was not curtilage.

Stitt next alleges that the detectives ventured beyond the turnaround and entered constitutionally protected curtilage—the backyard—before spying Stitt at the backdoor. One detective admitted he "[didn't] know" whether "[his] front tires [were] in the grass" beyond the turnaround when he stopped the car. But the magistrate judge explicitly found that the detectives remained in the turnaround, noting that "there was no clear end to the driveway and [the detective] credibly testified that he stepped out onto the gravel driveway when he exited his car, which he parked in the driveway." The district court adopted these factual findings, and unless Stitt pinpoints a clear error, we cannot overturn these findings on appeal. Stitt merely asks us to reinterpret the detective's uncertain testimony in his favor and therefore fails to show clear error.

A final point. Stitt emphasizes the property's rural, low-income character, arguing that such properties lack clear divisions between curtilage and public areas. Affirming the denial of his suppression motion, he argues, would unfairly privilege wealthy homeowners who can afford fences and bushes to separate public driveways from private backyards. But a railroad tie, a large rock, or a sign would have marked the edge of

the backyard and warned visitors not to proceed further. Testimony established that no such marker existed on the property. We discern no error in the denial of Stitt's motion to suppress.

III.

Next, Stitt alleges that the district court's failure to instruct the jury on venue requires us to vacate his conviction. Because he neglected to object to the venue-instruction omission at trial, we review for plain error. *United States v. Cooper*, 40 F. App'x 39, 40 (6th Cir. 2002). A plain error affects a defendant's substantial rights and seriously questions the fairness, integrity or public reputation of the judicial proceedings. *United States v. Smith*, 601 F.3d 530, 541 (6th Cir. 2010). We reverse for plain error in jury instructions upon a showing that "taken as a whole, the jury instructions were so clearly erroneous as to likely produce a grave miscarriage of justice." *United States v. Semrau*, 693 F.3d 510, 528 (6th Cir. 2012) (quoting *United States v. Morrison*, 594 F.3d 543, 546 (6th Cir. 2010)). Stitt claims to meet this exacting standard because the evidence at trial insufficiently established venue in the Eastern District of Tennessee, and the jury—if properly instructed—would have found accordingly.

Venue is indeed a question of fact for the jury, *United States v. Redfearn*, 906 F.2d 352, 354 (8th Cir. 1990), but unlike other facts in the government's case, a preponderance of the evidence suffices, *United States v. Beddow*, 957 F.2d 1330, 1335 (6th Cir. 1992). Here, Hostetler's identification of the gun with which Stitt threatened her in the Eastern District matched the detective's identification of the gun he found in the Middle District. Additionally, the woman who drove Stitt

from the Eastern District to the Middle District never saw Stitt stop, pick up, or discard anything. When, as here, the evidence sufficiently establishes venue, and the defendant fails to request a venue instruction, the instruction's absence is not plain error. *See United States v. Massa*, 686 F.2d 526, 530 & n.10 (7th Cir. 1982) (collecting cases).

IV.

Finally, Stitt claims that none of the nine convictions relied upon by the district court in sentencing him as an armed career criminal qualify as ACCA predicates. That misclassification, he continues, triggered the ACCA's fifteen-year minimum sentence—far exceeding the ten-year statutory maximum for felon-in-possession convictions—and requires us to vacate his sentence. *Compare* 18 U.S.C. § 924(e)(1), *with id.* § 924(a)(2). The government concedes that two convictions for facilitation of aggravated burglary and one conviction for attempted aggravated burglary are not ACCA predicate offenses. *See Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015). We therefore consider whether at least three of Stitt's six convictions for Tennessee aggravated burglary qualify as violent felonies. *See* 18 U.S.C. § 924(e)(1) (requiring three previous violent- felony convictions to impose a fifteen-year minimum sentence under the ACCA).

In its enumerated-offense clause, the ACCA singles out offenses that, if "punishable by imprisonment for a term exceeding one year," 18 U.S.C. § 924(e)(2)(B), always constitute violent felonies, including burglary, *id.* § 924(e)(2)(B)(ii). A state burglary offense falls within that clause if it describes the "generic" version of burglary. *Descamps v. United States*, 133 S. Ct.

2276, 2281 (2013). Generic burglary "ha[s] the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). Tennessee aggravated burglary therefore qualifies as generic burglary "only if the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps*, 133 S. Ct. at 2281 (the "categorical approach"). If the statute includes broader elements than generic burglary, but it "sets out one or more elements . . . in the alternative," the statute still qualifies as generic burglary if the government establishes that Stitt was necessarily convicted of the aggravated-burglary alternative that matches the elements of generic burglary. *Id.* (the "modified-categorical approach").

Tennessee aggravated burglary "is burglary of a habitation," Tenn. Code Ann. § 39-14-403, where "habitation" describes a structure for overnight accommodation; an occupied self-propelled vehicle designed for overnight accommodation; or a separately secured or occupied portion of or structure appurtenant to such a structure or vehicle, *id.* § 39-14-401(1). Both parties invite us to evaluate Stitt's aggravated-burglary convictions under the modified-categorical approach, noting that aggravated burglary's inclusion of self-propelled vehicles expands the statute beyond generic burglary, which requires buildings or structures. *See Taylor*, 495 U.S. at 599 ("A few States' burglary statutes, however, . . . define burglary more broadly [than generic burglary], *e.g.*, . . . by including places, such as automobiles and vending machines, other than buildings."); *see also United States v. Priddy*, 808 F.3d 676, 687 (6th Cir. 2015) (White, J., concurring)

("Tennessee's expansive definition of 'habitation' . . . likely renders its aggravated burglary statute broader than *Taylor*'s definition of generic burglary.").

We may not use the modified-categorical approach here—our precedents foreclose it. We repeatedly have found that "a Tennessee conviction for aggravated burglary is *categorically* a violent felony under the ACCA's enumerated-offense clause." *Priddy*, 808 F.3d at 684 (majority opinion) (emphasis added); *see also United States v. Nance*, 481 F.3d 882, 887 (6th Cir. 2007) (holding that "the weight of authority indicates that Tennessee's aggravated burglary statute is generic"). Only the full court may invalidate the holdings of *Priddy* and *Nance*. Stitt's six aggravated-burglary convictions categorically qualify as ACCA predicates. The district court therefore committed no error in deeming Stitt an armed career criminal.

V.

We AFFIRM Stitt's conviction and sentence.

APPENDIX C

1. 18 U.S.C. 924 provides:

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the pro-

visions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including

any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, dur-

ing and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the pres-

ence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or

any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described

in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled

Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(*l*) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed deal-

er, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(o) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

(1) IN GENERAL.—

(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) REVIEW.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) ADMINISTRATIVE REMEDIES.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

2. Tenn. Code Ann. § 39-14-401 (Supp. 2001) provides:

Definitions for burglary and related offenses.—As used in this part, unless the context otherwise requires:

(1) "Habitation":

(A) Means any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons;

(B) Includes a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant; and

(C) Includes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle;

(2) "Occupied" means the condition of the lawful physical presence of any person at any time while the defendant is within the habitation or other building; and

(3) "Owner" means a person in lawful possession of property, whether the possession is actual or constructive. "Owner" does not include a person, who is restrained from the property or habitation by a valid

court order or order of protection, other than an ex parte order of protection, obtained by the person maintaining residence on the property.

3. Tenn. Code Ann. § 39-14-402 (1997) provides:

Burglary.—(a) A person commits burglary who, without the effective consent of the property owner:

(1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;

(2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;

(3) Enters a building and commits or attempts to commit a felony, theft or assault; or

(4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

(b) As used in this section, "enter" means:

(1) Intrusion of any part of the body; or

(2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise.

(c) Burglary under subdivision (a)(1), (2) or (3) is a Class D felony.

(d) Burglary under subdivision (a)(4) is a Class E felony.

4. Tenn. Code Ann. § 39-14-403 (1997) provides:

Aggravated burglary.—(a) Aggravated burglary is burglary of a habitation as defined in §§ 39-14-401 and 39-14-402.

(b) Aggravated burglary is a Class C felony.

APPENDIX D

State Burglary Statutes at the Time of 18 U.S.C. 924(e)(2)(B)(ii)'s Enactment (Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39)

* Statutes encompassing nonpermanent or mobile structures irrespective of their purpose

† Statutes encompassing nonpermanent or mobile structures used for enumerated purposes

‡ Statutes adhering to the common-law definition of burglary

§ Statutes broader than the common-law definition that exclude or do not specifically address nonpermanent or mobile structures

Alabama†	Ala. Code §§ 13A-7-5, 13A-7-6, 13A-7-7 (1982) (defining burglary as involving a "dwelling" or "building"); *id.* § 13A-7-1(2) (Supp. 1983) (defining building as "[a]ny structure which may be entered and utilized by persons for business, public use, lodging or the storage of goods, * * * includ[ing] any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein").

Alaska†	Alaska Stat. §§ 11.46.300, 11.46.310 (1983) (defining burglary as involving a "building"); *id.* § 11.81.900 (Supp. 1985) (defining building to include, "in addition to its usual meaning, * * * any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business").
Arizona†	Ariz. Rev. Stat. Ann. § 13-1506 (Supp. 1981) (defining burglary as involving "a nonresidential structure"); *id.* § 13-1501(8) (1978) (defining "[s]tructure" as "any building, object, vehicle, railroad car or place with sides and a floor, separately securable from any other structure attached to it and used for lodging, business, transportation, recreation or storage").
Arkansas†	Ark. Stat. Ann. §§ 41-2001, 41-2002 (1977) (defining burglary as involving an "occupiable structure," *i.e.*, "a vehicle, building, or other structure: (a) where any person lives or carries on a business or other calling; * * * (b) where people assemble for purpose of business, government, education, religion, entertainment, or public transportation; or (c) which is customarily used for overnight accommoda-

	tion of persons").
California*	Cal. Penal Code § 459 (Deering 1985) (defining burglary as involving "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse[,] or other building, tent, vessel, railroad car, locked or sealed cargo container * * * , trailer coach * * * , any house car * * * , inhabited camper * * * , vehicle * * * when the doors of such vehicle are locked, aircraft * * * , [or] mine").
Colorado†	Colo. Rev. Stat. §§ 18-4-101, 18-4-202, 18-4-203 (1986) (defining first- and second-degree burglary as involving a "building or occupied structure," *i.e.*, "a structure which has the capacity to contain, and is designed for the shelter of, man, animals, or property, * * * includ[ing] a ship, trailer, sleeping car, airplane, or other vehicle or place adapted for overnight accommodations of persons or animals, or for carrying on of business therein" (building) or "any area, place, facility, or enclosure which * * * is in fact occupied by a person or animal, and known

	by the defendant to be thus occupied" (occupied structure)).
Connecticut*	Conn. Gen. Stat. Ann. § 53a-103 (West 1972) (defining burglary as involving a "building"); *id.* § 53a-100(a)(1) (West Supp. 1985) (defining building to include, "in addition to its ordinary meaning, * * * any watercraft, aircraft, trailer, sleeping car, railroad car, other structure or vehicle").
Delaware*	Del. Code Ann. tit. 11, §§ 221(1), 824-825 (1979) (defining burglary as involving, *inter alia*, a "building," defined to include, "in addition to its ordinary meaning, * * * any structure, vehicle or watercraft").
District of Columbia*	D.C. Code Ann. § 22-1801(b) (1973) (defining burglary as involving "any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, * * * any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade").
Florida*	Fla. Stat. chs. 810.011, 810.02(1) (1985) (defining burglary as involv-

	ing "a structure or a conveyance," *i.e.*, "a building of any kind, either temporary or permanent, which has a roof over it" (structure) or "any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car" (conveyance)).
Georgia†	Ga. Code Ann. § 16-7-1 (Michie 1984) (defining burglary as involving "the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another").
Hawaii†	Haw. Rev. Stat. §§ 708-800, 708-810 (1985) (defining burglary as involving a "building," *i.e.*, "any structure, [or] * * * any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein").
Idaho*	Idaho Code § 18-1401 (Supp. 1981) (defining burglary as involving a "house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, closed vehicle, closed trailer, airplane or railroad car").
Illinois*	Ill. Rev. Stat. ch. 38, paras. 2-6, 19-1(a), 19-3(a) (1983) (defining burglary as involving a "building, house-trailer, watercraft, aircraft, motor

	vehicle[,] * * * [or] railroad car," and defining residential burglary as involving a "dwelling," *i.e.*, "a building or portion thereof, a tent, a vehicle, or other enclosed space which is used or intended for use as a human habitation").
Indiana[§]	Ind. Code Ann. § 35-43-2-1 (Burns Supp. 1984) (defining burglary as involving a "building or structure" without further defining those terms); see also *McCormick* v. *State*, 382 N.E.2d 172, 174-176 & nn.1-2 (Ind. Ct. App. 1978) (noting that, until 1976, Indiana separately criminalized burglary of any boat, railroad car, automobile, or building other than a dwelling).
Iowa[†]	Iowa Code §§ 702.12, 713.1-713.6 (1985) (defining burglary as involving an "occupied structure," *i.e.*, "any building, structure, * * * land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value," but not an "object or device * * * too small or not designed to allow a person to physically enter or oc-

	cupy it").
Kansas*	Kan. Stat. Ann. § 21-3715 (Supp. 1974) (defining burglary to involve a "building, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property").
Kentucky†	Ky. Rev. Stat. Ann. §§ 511.010, 511.020, 511.030 (Michie 1985) (defining burglary as involving a "building" or "dwelling," defined to include, "in addition to its ordinary meaning, * * * any structure, vehicle, watercraft or aircraft (a) [w]here any person lives; or (b) [w]here people assemble for purposes of business, government, education, religion, entertainment or public transportation" (building) or "a building which is usually occupied by a person lodging therein" (dwelling)).
Louisiana*	La. Rev. Stat. Ann. § 14:62 (West 1986) (defining burglary as involving "any dwelling, vehicle, watercraft, or other structure, movable or immovable").
Maine†	Me. Rev. Stat. Ann. tit. 17-A, § 401 (West 1983 & Supp. 1986) (defining burglary as involving a

	"structure"); *id.* § 2(24) (West 1983) (defining structure as "a building or other place designed to provide protection for persons or property against weather or intrusion, but * * * not includ[ing] vehicles and other conveyances whose primary purpose is transportation of persons or property unless such vehicle or conveyance, or a section thereof, is also a dwelling place").
Maryland[1]	See *Sizemore* v. *State*, 272 A.2d 824, 825-826 (Md. Ct. Spec. App.) (citing Md. Ann. Code art. 27, §§ 29-30, 32-33 (1967), and noting that Maryland "recognizes six separate and distinct crimes related to the breaking of structures," including common-law burglary, daytime housebreaking, and "storehouse breaking," which "cover[s] all buildings other than dwelling houses" but is "not burglary at all"), cert. denied, 261 Md. 728 (1971).
Massachusetts*	Mass. Gen. L. ch. 266, § 15 (1986) (defining burglary as involving "a dwelling house"); see *id.* §§ 16, 19, 20A (separately prohibiting the "break[ing] and ent[ry]" into any "building, ship, vessel or vehicle," railroad cars, or any "truck, tractor/

	trailer unit, trailer, semi-trailer or freight container").
Michigan*	Mich. Comp. Laws Ann. § 750.110 (West 1968) (defining breaking and entering to involve an "occupied dwelling," as well as a "tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat or ship, railroad car or * * * any unoccupied dwelling house").
Minnesota†	Minn. Stat. §§ 609.556, 609.582 (1986) (defining burglary as involving a "building," defined to include, "in addition to its ordinary meaning[,] * * * any tent, watercraft, structure or vehicle that is customarily used for overnight lodging of a person").
Mississippi‡	Miss. Code Ann. § 97-17-19 (1973) (defining burglary as involving "any dwelling house").
Missouri†	Mo. Rev. Stat. §§ 569.010, 569.170 (1986) (defining burglary as involving a "building" or "inhabitable structure," *i.e.*, "a ship, trailer, sleeping car, airplane, or other vehicle or structure: (a) Where any person lives or carries on business or other calling; or (b) Where people assemble for purposes of busi-

	ness, government, education, religion, entertainment or public transportation; or (c) Which is used for overnight accommodation of persons").
Montana†	Mont. Code Ann. §§ 45-2-101(40), 45-6-204 (1985) (defining burglary as involving an "occupied structure," *i.e.*, a "building, vehicle, or other place suitable for human occupancy or night lodging of persons or for carrying on business").
Nebraska‡	Neb. Rev. Stat. § 28-507 (1985) (defining burglary as involving "real estate or any improvements erected thereon").
Nevada*	Nev. Rev. Stat. Ann. § 205.060 (Michie 1986) (defining burglary as involving "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or housetrailer, airplane, glider, boat or railroad car").
New Hampshire†	N.H. Rev. Stat. Ann. § 635:1 (1986) (defining burglary as involving a "building or occupied structure," *i.e.*, "any structure, vehicle, boat or place adapted for overnight accommodation of per-

	sons, or for carrying on business").
New Jersey*	N.J. Stat. Ann. §§ 2C:18-1, 2C:18-2 (West 1982) (defining burglary as involving a "structure," *i.e.*, "any building, room, ship, vessel, car, vehicle or airplane, and also * * * any place adapted for overnight accommodation of persons, or for carrying on business therein").
New Mexico*	N.M. Stat. Ann. § 30-16-3 (Michie 1978) (defining burglary as involving "any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable").
New York†	N.Y. Penal Law § 140.20 (McKinney 1975) (defining burglary as involving a "building"); *id.* § 140.00(2) (McKinney Supp. 1986) (defining building to include, "in addition to its ordinary meaning, * * * any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer").
North Carolina‡	*State* v. *Oakman*, 388 S.E.2d 579, 581 (N.C. Ct. App. 1990) ("North Carolina retains the common law

	definition of burglary.").
North Dakota†	N.D. Cent. Code §§ 12.1-22-02, 12.1-22-06 (1985) (defining burglary as involving a "building" or "occupied structure," *i.e.*, "a structure or vehicle: a. Where any person lives or carries on business or other calling; or b. Which is used for overnight accommodation of persons").
Ohio†	Ohio Rev. Code Ann. § 2911.12 (Anderson Supp. 1985) (defining burglary as involving an "occupied structure)"; *id.* § 2909.01 (Anderson 1982) (defining occupied structure as "any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, * * * (A) Which is maintained as a permanent or temporary dwelling * * * ; (B) Which at the time is occupied as the permanent or temporary habitation of any person * * * ; (C) Which at the time is specially adapted for the overnight accommodation of any person * * * ; [or] (D) In which at the time any person is present or likely to be present").
Oklahoma*	Okla. Stat. Ann. tit. 21, § 1435 (West Supp. 1982) (defining bur-

	glary as involving "any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection, in which any property is kept").
Oregon†	Or. Rev. Stat. §§ 164.205(1), 164.215(1) (1983) (defining burglary as involving a "building," defined to include, "in addition to its ordinary meaning, * * * any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein").
Pennsylvania†	18 Pa. Cons. Stat. Ann. §§ 3501, 3502 (1973) (defining burglary as involving a "building" or "occupied structure," *i.e.*, "[a]ny structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein").
Rhode Island†	R.I. Gen. Laws § 11-8-1 (1981) (common-law definition of burglary).
South Carolina†	S.C. Code Ann. §§ 16-11-310(1), 16-11-313 (Law. Co-op. Supp. 1985) (defining burglary as involving a "building," *i.e.*, "any structure, vehicle, watercraft, or aircraft: (a) Where any person lodges or lives; or (b) Where people assem-

	ble for purposes of business, government, education, religion, entertainment, public transportation, or public use or where goods are stored").
South Dakota*	S.D. Codified Laws §§ 22-32-1, 22-32-3, 22-32-8 (1979) (defining burglary as involving a "structure"); S.D. Codified Laws Ann. § 22-1-2(46) (Supp. 1986) (defining structure as "any house, building, outbuilding, motor vehicle, watercraft, aircraft, railroad car, truck, trailer, tent, or other edifice, vehicle or shelter, or any portion thereof").
Tennessee*	Tenn. Code Ann. §§ 39-3-401, 39-3-403, 39-3-404, 39-3-406 (1982) (defining burglary as involving "a dwelling house, or any other house, building, room or rooms therein used and occupied by any person or persons as a dwelling place or lodging either permanently or temporarily" (general burglary and second-degree burglary); "a business house, outhouse, or any other house of another, other than dwelling house" (third-degree burglary); or "any freight or passenger car, automobile, truck, trailer or other motor vehicle" (breaking into vehicles)).

Texas†	Tex. Penal Code Ann. §§ 30.01, 30.02 (West 1974) (defining burglary as involving a "building" or "habitation," *i.e.*, "a structure or vehicle that is adapted for the overnight accommodation of persons").
Utah†	Utah Code Ann. §§ 76-6-201, 76-6-202 (1978) (defining burglary as involving a "building," defined to include, "in addition to its ordinary meaning, * * * any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business").
Vermont§	Vt. Stat. Ann. tit. 13, § 1201 (Supp. 1982) (defining burglary as involving a "building or structure" without further defining those terms beyond "their common meanings").
Virginia†	Va. Code Ann. § 18.2-90 (Michie Supp. 1986) (defining burglary as involving "any office, shop, storehouse, warehouse, banking house, or other house, or any ship, vessel or river craft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of

	human habitation").
Washington†	Wash. Rev. Code. §§ 9A.52.020, 9A.52.030 (1985) (defining burglary as involving a "dwelling" or a "building"); *id.* § 9A.04.110 (Supp. 1986) (defining dwelling as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging" (first-degree burglary); and defining building to include, "in addition to its ordinary meaning, * * * any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods" (second-degree burglary)).
West Virginia†	W. Va. Code Ann. § 61-3-11 (Michie 1977) (defining burglary as involving a "dwelling house," which "shall include, but not be limited to, a mobile home, house trailer, modular home or self-propelled motor home, used as a dwelling regularly or only from time to time, or any other nonmotive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from

	time to time").
Wisconsin*	Wisc. Stat. Ann. § 943.10 (West 1982) (defining burglary as involving "[a]ny building or dwelling; * * * enclosed railroad car; * * * enclosed portion of any ship or vessel; * * * [or] motor home or other motorized type of home or a trailer home").
Wyoming*	Wyo. Stat. Ann. § 6-3-301 (Supp. 1986) (defining burglary as involving "a building, occupied structure or vehicle, or separately secured or occupied portion thereof").

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2017

CASE NO. 17-765

UNITED STATES OF AMERICA,
Petitioner,

-vs-

VICTOR J. STITT,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SIXTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondent provides that he is an individual.

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OPINIONS BELOW

The en banc opinion of the Sixth Circuit Court of Appeals is reported at 860 F.3d 854, and reproduced at Pet. App. 1a-55a. The panel opinion from the Sixth Circuit Court of Appeals is found at 637 F. App'x 924 and reproduced at Pet. App. 56a-64a.

STATUTES INVOLVED

The relevant statutes are reproduced at Pet. App. 65a-80a.

STATEMENT OF THE CASE

Victor Stitt was convicted by jury of being a felon in possession of a firearm, in violation of 18 U.S.C. § 924(g). At sentencing, the district court found Mr. Stitt to have at least three prior convictions which qualified as violent felonies under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Having been classified as an ACCA, Mr. Stitt's statutory penalty for his offense increased from a ten-year maximum to a fifteen-year mandatory minimum term of incarceration. The district court sentenced Mr. Stitt to 290 months in prison and Mr. Stitt appealed. (Cert. Pet. App. at 57a-58a).

On appeal, Mr. Stitt argued that none of his prior convictions qualified as violent felonies under the ACCA. The government conceded this Court's decision in *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015), prohibited certain prior offenses from being qualifying predicates. Therefore, the issue on appeal was limited to whether Tennessee's aggravated burglary statute qualified as a violent felony under the ACCA statute. (Cert. Pet. App. at 62a). The Sixth Circuit, relying on its

own precedent, held Tennessee's aggravated burglary statute is categorically a violent felony under the ACCA's enumerated-offense clause. (Cert. Pet. App. at 64a).

Mr. Stitt filed a motion for a rehearing en banc, arguing an inter-circuit conflict. The Sixth Circuit had previously held Tennessee's aggravated burglary statute was categorically a violent felony but had "reached the opposite conclusion about Ohio's similarly worded burglary statute." (Cert. Pet. App. at 1a-2a). The Sixth Circuit granted Mr. Stitt's motion for a rehearing to resolve this conflict.

The government initially conceded Tennessee's aggravated burglary statute covered more places than "buildings or structures." It argued, however, that the aggravated burglary statute was divisible and therefore the modified categorical approach applied. While in the en banc briefing stage, this Court issued its decision in *Mathis v. United States*, __ U.S. __,136 S. Ct. 2243 (2016). The government then changed its position and argued Tennessee's aggravated burglary statute is not divisible but meets this Court's definition of "building or structure" because the vehicles and moveable enclosures are required to be adapted for overnight accommodations. (Cert. Pet. App. at 5a, fn. 1).

The majority of the Sixth Circuit rejected the government's position, finding "the government's arguments * * * ignore the [Supreme] Court's clear and unambiguous language that 'building or other structure' excludes *all* things mobile or transitory." (Cert. Pet. App. at 8a) (emphasis in original). "[T]he Supreme Court has held fast to the distinction between vehicles and movable enclosures versus buildings and structures in every single post-*Taylor* decision." (Cert. Pet. App. at 6a).

"Th[is] Court's adherence to this distinction over the course of nearly thirty years persuade[d] [the Sixth Circuit] that the Court meant exactly what it said: vehicles and moveable enclosures fall outside the scope of generic burglary." (Cert. Pet. App. at 6a-7a).

The dissent concluded Tennessee's aggravated burglary statute fell within the generic definition of burglary because its locations "match the traditional meaning of 'dwelling'" and that "*Taylor* tells us that burglary of a dwelling is always generic." (Cert. Pet. App. at 46a-47a). The majority and both concurring opinions rejected the dissent's rationale and conclude that *Taylor*, and its progeny, require the conclusion that Tennessee's aggravated burglary statute is broader than generic burglary. (Cert. Pet. App. at 1a-43a).

REASONS FOR DENYING THE WRIT

I. This Court has already defined generic burglary to exclude vehicles and moveable enclosures.

This Court should deny certiorari in this case because it has already defined generic burglary to exclude vehicles and moveable enclosures. Burglary under the Armed Career Criminal Act ("ACCA") was initially defined by statute. The ACCA of 1984 defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is the property of another with intent to engage in conduct constituting a Federal or State offense." *Taylor v. United States*, 495 U.S. 575, 581 (1990) (quoting 18 U.S.C. § 1202(c)(9) (1984)). In 1986, the ACCA was amended and the definition of burglary was deleted. *Taylor*, 495 at 582. In 1990, this Court was called upon to define burglary as used in the ACCA. *Taylor*, 495 U.S. 575.

In constructing the definition, this Court reviewed the ACCA's pre-1986 statutory definition of burglary, Congress' changes to the ACCA statute, the legislative history related to the 1986 amendment, and the "modern 'generic' view of burglary in a majority of the States' criminal codes at the time of the 1986 amendment." *Taylor*, 495 at 582-590. This Court noted, "the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process." *Taylor*, 495 at 589-590. Nonetheless, the Court held that Congress intended the term burglary "in the generic sense," and that the generic meaning "is practically identical to the 1984 definition." *Taylor*, 495 at 598.

After discussing the traditional common law definition, the Model Penal Code, a prominent criminal law treatise, and various states' criminal codes, this Court

defined generic burglary as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 at 592-599. The Court further held that burglary statutes that include places other than buildings, "such as automobiles and vending machines," are broader than generic burglary. *Taylor*, 495 at 599.

Throughout the years since *Taylor*, this Court has maintained the exclusion of vehicles and moveable enclosures from the definition of generic burglary. *Mathis v. United States*, __ U.S. ___, 136 S. Ct. 2243, 2250 (2016) (Iowa's burglary statute "covers more conduct than generic burglary" because it "reaches a broader range of places: 'any building, structure, *[or] land, water, or air vehicle*.'" (alteration in original) (citations omitted)); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (noting that "breaking into a building" would qualify as generic burglary, but breaking into a "vessel" would not); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186–87 (2007) (noting that Massachusetts defines burglary to include breaking into a vehicle, "which falls outside the generic definition of 'burglary,' for a car is not a 'building or structure'" (citations omitted)); *Shepard v. United States*, 544 U.S. 13, 15–16 (2005) ("The [ACCA] makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle.").

The government argues that this Court must have meant to include vehicles and moveable enclosures that have been adapted for overnight accommodations in its definition of generic burglary because the "overwhelming majority of states included

vehicles and moveable enclosures in their burglary statutes." (Cert. Pet. at 6). This statement is misleading.

II. The question presented is not worthy of Supreme Court review.

Assuming without conceding that the chart submitted by the government is an accurate recounting of state burglary statutes at the time *Taylor* was decided, (Cert. Pet. App. at 81a-97a), ruling in the government's favor on the issue presented would bring only a handful of states' burglary statues within the definition of generic burglary.

According to the government's chart, forty-four states include vehicles and/or moveable enclosures in their burglary statutes. However, the majority of those states do not limit the inclusion of vehicles and/or moveable enclosures to ones that are adapted for the overnight accommodation of persons. Nineteen states have burglary statutes that include vehicles and/or other moveable enclosures without any use limitation. [1] Of the remaining twenty-five states, most include vehicles and/or moveable enclosures that have some other purposes, like carrying on a business,[2] business transportation,[3] where people assemble for the purposes of business,[4] or are

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[1] California, Connecticut, Delaware, Florida, Idaho, Kansas, Louisiana, Massachusetts, Nevada, New Mexico, Oklahoma, South Dakota, Wisconsin, Wyoming

[2] Alabama, Alaska, Arkansas, Colorado, Iowa, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Utah, Washington

[3] Arizona

[4] Arkansas, Kentucky, Iowa, Missouri, South Carolina

used to store, transport, or sell goods or merchandise.[5] In reality, only six states have statutes that would be included in the government's expanded definition of generic burglary.[6] Thus, the government's argument that this Court must have meant to include vehicles and moveable enclosures that have been adapted for overnight accommodations in its definition of generic burglary because the "overwhelming majority of states included vehicles and moveable enclosures in their burglary statutes," is flawed. (Cert. Pet. at 6). The government's argument fails to recognize that the majority of states' burglary statutes do not limit the inclusion of vehicles and moveable structures to only those locations adapted for the overnight accommodations of persons.

Notably, one of the state statutes that may be included in the proposed expanded definition is Texas. Yet, this Court specifically reviewed Texas's burglary statutes when it held vehicles were outside the definition of generic burglary. *Taylor*, 495 at 591 (citing Tex. Penal Code Ann. §§ 30.01-30.05 (1989 and Supp. 1990)). Because this Court has already defined generic burglary to exclude vehicles and moveable enclosures, and has consistently maintained this definition throughout the seventeen years since *Taylor*, certiorari should be denied.

III. There is no mature circuit split at this time.

Additionally, the government's petition for certiorari in this case should be denied because there is no mature circuit split on this issue.

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[5] Iowa, Mississippi, South Carolina, Washington

[6] Georgia, Hawaii, Maine, Minnesota, Texas, and West Virginia

In 1996, the Tenth Circuit held Texas's burglary of a habitation statute qualified as generic burglary. *United States v. Spring*, 80 F.3d 1450, 1461-62 (10th Cir. 1996), *cert. denied*, 519 U.S. 963 (1996). Texas, by statute, defined habitation as "a structure or vehicle that is adapted for the overnight accommodation of persons." *Id.* at 1462. The Tenth Circuit held that because the statute only covered vehicles adapted for the overnight accommodation of persons, it fell within this Court's definition of generic burglary as defined in *Taylor*. In reaching its conclusion, the Tenth Circuit relied entirely on two cases: *United States v. Silva*, 957 F.2d 157 (5th Cir. 1992), and *United States v. Sweeten*, 933 F.2d 765 (9th Cir. 1991). *Sweeten* is no longer good law and *Silva* has been called into question with the Fifth Circuit's recent grant of a rehearing en banc. Additionally, the Tenth Circuit's *Spring* decision is inconsistent with its decision in *United States v. Scoville*, 561 F.3d 1174 (10th Cir. 2009), *cert. denied*, 588 U.S. 888 (2009).

The Ninth Circuit overruled *Sweeten* in *United States v. Grisel*, 488 F.3d 844, 851, fn. 5 (9th Cir. 2007) (en banc), *cert. denied*, 552 U.S. 970 (2007). In *Grisel*, the Ninth Circuit conducted a thorough review of this Court's decision in *Taylor* and recognized that "*Taylor* jettisoned analyzing the *use* of an object in favor of analyzing the *nature* of the object when it adopted an express definition of burglary that is limited to the breaking and entering of building * * * ." *Id.* Unlike in *Sweeten*, the Ninth Circuit had the benefit of *Shepard v. United States*, 544 U.S. 13 (2005), when it decided *Grisel*. In *Shepard*, this Court reiterated that the Armed Career Criminal Act "makes burglary a violent felony if committed in a building or enclosed space

('generic burglary'), not in a boat or motor vehicle." *Shepard*, 544 U.S. at 15-16. *Grisel* is the controlling law in the Ninth Circuit and is in line with the Sixth Circuit's decision in *Stitt*.

Additionally, the Fifth Circuit has recently granted a rehearing en banc in *United States v. Herrold*, 685 F. App'x 302 (5th Cir. 2017), *reh'g en banc granted*, 693 F. App'x 272 (July 7, 2017). The issue presented for rehearing is whether Texas's burglary of a habitation is a generic burglary and a qualifying predicate for the ACCA. (No. 14-11317, Splmt En Banc Brief Dkt. 00514109999). This is the same Texas burglary statute at issue in *Silva, Spring,* and *Sweeten*. Thus, the Fifth Circuit's decision to grant a rehearing en banc in *Herrold* raises the question of whether *Silva* remains good law.

Without *Sweeten* and *Silva*, the Tenth Circuit's decision in *Spring* is without support. *Spring* was decided in 1996, prior to this Court's decisions in *Shepard, Nijhawan, Duenas-Alvarez, Descamps*, and *Mathis*. Moreover, *Spring* is in conflict with another case from the Tenth Circuit. In 2009, the Tenth Circuit issued a decision in *United States v. Scoville*, 561 F.3d 1174 (10th Cir. 2009), *cert. denied*, 588 U.S. 888 (2009). The court's analysis in *Scoville* conflicts with *Spring*.

In *Scoville*, the Tenth Circuit held, "*Taylor* instructs that a statute that includes structures 'such as automobiles and vending machines, other than buildings' is broader than generic burglary." *Id.* at 1177. The issue presented in *Scoville* was whether Ohio's burglary statute was within the generic definition. Ohio burglary included "houses, buildings, vehicles, and other structures that are occupied as a

dwelling or habitation, that are adapted for the overnight accommodation of persons, or in which a person is present or likely to be present." *Id.* at 1179. The Tenth Circuit held Ohio's third-degree burglary statute was broader than generic burglary as defined in *Taylor*. *Id.* at 1179. *Scoville* and *Spring* create an intra-circuit conflict, and should be addressed by the Tenth Circuit.

The Sixth Circuit recently corrected an intra-circuit split on the same issue. In *Coleman*, the Sixth Circuit held, "Ohio's third-degree burglary statute sweeps more broadly than generic burglary because it 'include[es] places, such as automobiles and vending machines, other than buildings." *United States v. Coleman*, 655 F.3d 480, 482 (6th Cir. 2011), *cert. denied*, 565 U.S. 1129 (2012). Ohio's third-degree burglary covered locations "maintained as a permanent or temporary dwelling," "occupied as the permanent or temporary habitation of any person," was "specially adapted for the overnight accommodations of any person," or where "any person is present or likely to be present." *Id.* at 482. The analysis in *Coleman* conflicted with the Sixth Circuit's analysis of Tennessee's aggravated burglary statute. *See, e.g., United States v. Nance*, 481 F. 3d 882 (6th Cir. 2007). The Sixth Circuit accepted *Stitt* en banc to correct this intra-circuit conflict. *See United States v. Stitt*, 860 F.3d at 854 (6th Cir. 2017). The Sixth Circuit now consistently holds that burglary statutes that include vehicles and moveable enclosures are outside the definition of generic burglary, even if the statutes require the various locations to be adapted for the overnight accommodations. *See Stitt*, 860 F.3d 854 at 857-861.

Despite having numerous opportunities to do so, this Court has never reframed the definition of generic burglary to look at the intended use of the location and the majority of the Circuits have consistently followed suit. The Third, Fourth, Sixth, Eighth, Ninth, and Eleventh Circuits hold that the "definitional focus is on the nature of the property or place, not the nature of its use at the time of the crime." *United States v. Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010), *cert. denied* 562 U.S. 1161 (2011), *abrogated by Descamps v. United States*, 133 S. Ct. 2276 (2013).

In *Rainer*, the Eleventh Circuit held Alabama's third-degree burglary statute was broader than generic burglary. This burglary statute provided that: "[a] person commits the crime of burglary in the third degree if he knowingly enters or remains unlawfully in a building with intent to commit a crime therein." *Rainer*, 616 F.3d at 1214 (citing Ala.Code § 13A-7-7 (1979)). Alabama law defined "building" to include vehicles, aircraft, or watercraft if those objects were used "for the lodging of persons or carrying on business therein." *Rainer*, 616 F.3d at 1215 (citing Ala.Code § 13A-7-1(2) (1979)). The government argued, "that the definition's conditional clause narrows the burglary statute's sweep to generic burglary." *Id.* at 1215.

The Eleventh Circuit rejected this argument and held "[t]he conditional clause does not limit the statute's sweep to generic burglary." *Id.* at 1215.

> Even if used "for the lodging of persons or carrying on business therein," *see* Ala.Code § 13A-7-1(2) (1979), vehicles, aircraft, and watercraft are not "building[s] or structure[s]" in the generic burglary sense. *See Taylor*, 495 U.S. at 599-600; *Shepard*, 544 U.S. at 15-16. The definitional focus is on the nature of the property or place, not on the nature of its use at the time of the crime.

Rainer, 616 F.3d at 1215. *See also United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016) (holding South Carolina's burglary of a "dwelling" is not generic burglary because it covers boats and vehicles); *United States v. Howard*, 742 F.3d 1334, 1347-1349 (11th Cir. 2014) (finding Alabama's third degree burglary statute non-generic and indivisible).

The Third Circuit has held that the inclusion of vehicles in a burglary statute, even if the vehicles are adapted for the overnight accommodations or for business, makes the statute broader than generic burglary. *United States v. Bennett*, 100 F.3d 1105, 1109 (3rd Cir. 1996). "The inclusion of 'any vehicle' in the statute demonstrates that the legislature did not intend to limit this statute to buildings." *Id.* (quoting *Commonwealth v. Hagan*, 539 Pa. 609, 654 (1995)).

The Fourth Circuit rejected the government's argument that Maryland's first-degree burglary statute qualified as a generic burglary because it only included places where a person resides and sleeps. *United States v. Henriquez*, 757 F.3d 144, 149 (4th Cir. 2014). The Fourth Court held that because "there is a realistic probability that Maryland's statute covers burglaries of motor vehicles or boats-places that the United States Supreme Court has expressly excluded from generic burglary," the statute swept more broadly than generic burglary. *Id.* at 146. *See also United States v. White*, 836 F.3d 437 (4th Cir. 2016) (West Virginia's burglary of a dwelling house is not generic burglary because it includes self-propelled motor homes.).

The Eighth Circuit has held that Arkansas's burglary of a "residential occupiable structure" is not a generic burglary. *United States v. Sims*, 854 F.3d 1037

(8th Cir. 2017). Under Arkansas state law, a "'[r]esidential occupiable structure' means a vehicle, building, or other structure: (i) [i]n which any person lives; or (ii) [t]hat is customarily used for overnight accommodation of a person whether or not a person is actually present." *Id.* at 1039 (quoting Ark. Code Ann. § 5-39-101(4)(A)). *See also United States v. Lamb*, 847 F.3d 928 (8th Cir. 2017) (holding Wisconsin's burglary of a motor home, whether or not someone was living in the motor home, is broader than generic burglary).

The Ninth Circuit, sitting en banc, held that Oregon's second-degree burglary is broader than generic burglary because it covers non-buildings. *Grisel*, 488 F.3d at 850. "Under Oregon law, '[b]uilding,' *in addition to its ordinary meaning*, includes any *booth, vehicle, boat, aircraft* or other structure adapted for overnight accommodation of person or for carrying on business therein. Or.Rev.Stat. § 164.205(1) (emphasis added)." *Grisel*, 488 F.3d at 850 (internal citations omitted). Oregon courts have held the term building includes "a semi-truck trailer being used to collect charitable donations" and "a fishing vessel." *Id.* at 850-851. "Trailers and boats are not buildings in the ordinary sense of the word – they are not constructed edifices intended for use in one place." *Id.* at 851. The majority of the Ninth Circuit rejected the argument that non-buildings adapted for the overnight accommodation of persons qualifies as generic burglary. *Id.* at 851, fn. 5. *See also United States v. Cisneros*, 826 F.3d 1190 (9th Cir. 2016). The Ninth Circuit has also held that Tennessee's aggravated burglary statute is broader than generic burglary. *United States v. Moncrief*, 356 F. App'x 11 (9th Cir. 2009).

Besides *Spring*, the only other case to hold generic burglary includes vehicles and moveable enclosures is *Smith v. United States*, __ F.3d __, 2017 WL 6350072 (7th Cir. Dec. 13, 2017).[7] *Smith* is the only case post- *Shepard*, *Nijhawan*, *Duenas-Alvarez*, *Descamps*, and *Mathis*, to conclude this Court must have intended to include mobile locations in the definition of generic burglary. To reach its conclusion in *Smith*, the Seventh Circuit panel relies entirely on *Spring* and Judge Sutton's dissent in *Stitt*. *Smith* concludes this Court in *Taylor*, and all of its subsequent cases, did not mean what it said when it specifically excluded vehicles and moveable enclosures from generic burglary. The court in *Smith* held that this Court "did not grapple with all enclosed spaces that people may call home," therefore, the Seventh Circuit felt free to construct its own definition. *Smith*, 2017 WL 6350072, at *4.

IV. This case is a poor vehicle to resolve the question presented.

Even if this Court were to conclude *Smith* creates a circuit split on this issue, *Stitt* is not the case to resolve the issue.[8] Assuming for argument's sake this Court were to adopt the government's expanded definition of generic burglary, Tennessee's aggravated burglary statute is still overbroad and cannot be an ACCA predicate.

Tennessee's aggravated burglary statute cannot categorically qualify as a violent felony under the ACCA because the conviction can be based on reckless

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[7] This case was decided after the government filed its petition for certiorari.

[8] A petition for a writ of certiorari in *Smith* was filed on January 17, 2018. Supreme Court No. 17-7517.

conduct. *See Begay v. United States*, 553 U.S. 137, 145 (2008) (negligent or reckless conduct is not sufficient to qualify as a violent felony; the ACCA punishes purposeful, violent and aggressive conduct). *See also Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004) (strict liability of DUI statute precludes statute from qualifying as a crime of violence); *Jones v. United States*, 689 F.3d 621, 626 (6th Cir. 2012) (reckless conduct does not qualify as an ACCA predicate).

"Aggravated burglary [in Tennessee] occurs when a person enters a habitation without the effective consent of the property owner and commits or attempts to commit a felony, theft, or assault." *State v. Adams*, No. M1998-00468-CCA-R3-CD, 1999 WL 1179580, at *6 (Tenn. Crim. App. Dec. 15, 1999) (citing Tenn. Code. Ann. §§ 39-14-402(a)(3)-403(a)). The statute does not require a mental state for entering the habitation. *State v. Snipes*, No. W2011-02161-CCA-R3-CD, 2013 WL 1557367, *9 (Tenn. Crim. App. Apr. 12, 2013) ("burglary statute is silent regarding the required mens rea").

Under Tennessee law, "[w]hen a specific mental state is not given as an element of an offense and is not plainly dispensed with in the offense, the [s]tate must at least prove that the defendant acted recklessly." *Adams*, 1999 WL 1179580, at *6. Tenn. Code Ann. § 39-11-301(c) states that "[i]f the definition of an offense within this title does not plainly dispense with a mental element, intent, knowledge or recklessness suffices to establish the culpable mental state."

Moreover, a review of Tennessee's pattern jury instruction for aggravated burglary, the statutes at issue, and the relevant case law, it is clear a mens rea is not

an element that must be pled with specificity. *See State v. Anderson*, No. E2014-00661-CCA-R3-CD, 2015 Tenn. Crim. App. LEXIS 538, at *55 (Tenn. Crim. App. June 29, 2015), *appeal denied*, 2015 Tenn. LEXIS 993 (Tenn., Nov. 24, 2015) ("The trial court properly instructed the jury that the elements of aggravated burglary are: (1) that the Defendant entered a habitation or any portion thereof; (2) that the Defendant entered with the intent to commit a theft; (3) that the Defendant acted without the effective consent of the owner; and (4) that the Defendant acted either intentionally, knowingly, or recklessly."). *See also* Tennessee's pattern jury instruction 14.02.

Because a conviction for aggravated burglary in Tennessee does not categorically require purposeful or intentional conduct when entering the habitation, it is not a qualifying predicate offense under the ACCA even if this Court were to adopt the government's expanded generic definition to include vehicles adapted for overnight accommodations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Nos. 17-765 and 17-766

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
VICTOR J. STITT,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
v.
JASON DANIEL SIMS,
Respondent.

On Writs of Certiorari to the United States Courts of Appeals for the Sixth and Eighth Circuits

RESPONDENTS' JOINT MOTION FOR DIVIDED ARGUMENT

Pursuant to Rules 21 and 28.4 of the Rules of this Court, respondent Victor J. Stitt ("Stitt") and respondent Jason Daniel Sims ("Sims") respectfully move for divided argument in this case. Each respondent requests 15 minutes of argument time, with counsel for respondent Stitt to appear first and counsel for respondent Sims to appear second. This division of argument time will ensure that each respondent has his interests adequately represented and his arguments fully conveyed by counsel, and that the Court receives a full understanding of the distinct issues raised by respondents. Petitioner has no objection to this motion.

1. This Court has consolidated these two cases for briefing and argument. Both involve the meaning of the term "burglary" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii) ("the ACCA"). But each case is a separate and distinct prosecution, involving not only different defendants, but also having been litigated below in different jurisdictions.

2. More important, each case concerns whether a distinct state statute qualifies as "burglary" under the ACCA. To make such determinations, this Court applies the "categorical approach." *Taylor v. United States*, 495 U.S. 575, 600 (1990). Under that approach, the Court compares "the statutory definition" of the state crime of conviction to the "generic" form of burglary referenced in the ACCA. *Id.* at 602. Yet the statutory definitions in *Stitt* and *Sims* are different. As is relevant here, the statute at issue in *Stitt* covers invasions of vehicles "designed or adapted for the overnight accommodation of persons" *and "each structure appurtenant to or connected with the . . . vehicle."* Tenn. Code Ann. § 39-14-401 (emphasis added). The statute at issue in *Sims* covers invasions of vehicles "customarily used for overnight accommodation of a person" *or "[i]in which any person lives."* Ark. Code Ann. § 5-39-101(4)(A) (emphasis added).

3. Partly for this reason, Stitt and Sims advance materially different arguments with respect to whether their relevant prior convictions qualify as "generic" burglary. *See* Stitt Resp. Br. at 33-35 (arguing that the Tennessee statute is broader than generic burglary because it covers places that are appurtenant to or connected with a structure or vehicle); Sims Resp. Br. at 25-41 (arguing that the

Arkansas statute is broader than generic burglary because it applies to vehicles not adapted for lodging). Counsel for each respondent will be in the best position to explain and expand upon those distinct arguments.

4. Finally, it bears stressing that a litigant's interest in being represented by counsel of choice is at its zenith in the context of criminal prosecutions. *Cf. United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). This Court, therefore, has regularly allowed divided argument in situations comparable to this one. *See, e.g., Turner v. United States*, 137 S. Ct. 1885 (2017) (Nos. 15-1503 & 15-1504); *Abbott v. United States*, 562 U.S. 8 (2010) (Nos. 09-479 & 09-7073). This Court has similarly allowed divided argument when multiple parties faced other types of governmental action involving their liberty or property. *See, e.g., Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012) (Nos. 10-1542 & 10-1543); *Shinseki v. Sanders*, 556 U.S. 396 (2009) (No. 07-1209); *Burlington No. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599 (2009) (Nos. 07-1601 & 07-1607).

5. For the foregoing reasons, both respondents' participation in oral argument would be of material assistance to this Court. Respondents therefore jointly request that the Court divide oral argument time equally between counsel for respondent Stitt and counsel for respondent Sims, to proceed in that order.

Respectfully submitted,

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No. 17-765

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR J. STITT, II

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The court of appeals' decision in this case "effectively reads 'burglary' out of" the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii). Pet. App. 52a (Sutton, J., dissenting). In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court defined "burglary" under the ACCA based on the "sense in which the term is now used in the criminal codes of most States." *Id.* at 598. But the court of appeals' holding—that burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can never constitute "burglary"—means that many jurisdictions would have no "burglary" offense at all. That holding contributes to a direct conflict of authority in the circuits—a division that has only grown since the petition for a writ of certiorari was filed. This Court's review is necessary to correct the court of appeals' misconstruction of a common ACCA predicate.

1. a. As the petition explains (Pet. 10-17), the court of appeals' crabbed interpretation of "burglary" is incorrect. The Tennessee aggravated-burglary statute at issue here is limited to burglary of a "habitation," defined to include certain mobile and nonpermanent structures adapted or used for overnight accommodation. See Tenn. Code Ann. § 39-14-403(a) (1997); *id.* § 39-14-401(1)(A)-(B) (Supp. 2001). As the petition details (Pet. 10-11), that provision is comparable to or narrower than nearly all state burglary statutes in existence in 1986, when the current statutory language was adopted. It therefore criminalizes "burglary" in the "generic sense" in which "the criminal codes of most States" had defined the term at that time. *Taylor*, 495 U.S. at 598.

Tennessee's aggravated-burglary provision is also narrower than the Model Penal Code's definition of burglary, which provided a model for *Taylor*'s definition of burglary as an offense "contain[ing] at least" the "elements" of "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." 495 U.S. at 598; see *id.* at 598 n.8. Since 1980, the Model Penal Code has described burglary as occurring in "a building or occupied structure," where "occupied structure" is defined to include "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." Model Penal Code §§ 221.0(1), 221.1(1) (1980). In criminalizing the burglary of mobile and nonpermanent dwellings, Tennessee's aggravated-burglary statute—like the Model Penal Code and the burglary provisions of most States—recognizes that burglary's "inherent potential for harm to persons," *Taylor*, 495 U.S. at 588,

is not limited solely to the invasion of certain kinds of homes. See Pet. 12-13, 14.

b. Respondent does not attempt to defend the decision below based on the sources that *Taylor* considered or Congress's concern that home invasions present a particularly great risk of harm to victims. See Br. in Opp. 4-6. Instead, he repeats the errors of the court of appeals.

Respondent argues (Br. in Opp. 4) that this Court already has determined that burglary under the ACCA excludes "vehicles and moveable enclosures." But although the Court has made clear that generic burglary does not encompass *all* unlawful entry into vehicles, automobiles, and vessels, neither *Taylor* nor any of the other decisions on which respondent relies (*id.* at 5) considered whether it encompasses unlawful entry into the subset of vehicles or other nonpermanent or mobile structures that are adapted or used for overnight accommodation. See Pet. 15; Pet. App. 48a-49a (Sutton, J., dissenting) (cautioning against "the mistake of reading" parts of this Court's opinions "like a statute"); *Smith* v. *United States*, 877 F.3d 720, 725 (7th Cir. 2017) (similar), petition for cert. pending, No. 17-7517 (filed Jan. 17, 2018).

Respondent additionally contends that *Taylor*'s definition of burglary focuses "on the nature of the property or place, not the nature of its use." Br. in Opp. 11 (citation omitted). As the petition explains, however, the phrase *Taylor* employed—"building or other structure"—is not so rigid as to ignore the difference between a trailer home and a shipping trailer. Pet. 16 (citation omitted); see *Smith*, 877 F.3d at 725; Model Penal Code § 221.1(1) cmt. 3(b) (1980). *Taylor* used the term "structure" in a context where the Model Penal

Code, and the burglary statutes of many States, had defined that term to include nonpermanent or mobile dwellings. *Taylor*, 495 U.S. at 598 n.8. In any event, because "form follows function, * * * it [is] impossible for *any* definition of burglary to avoid functional considerations." Pet. App. 50a (Sutton, J. dissenting); see Pet. 16.

2. As the petition explains (Pet. 17-22), the question presented is important, recurring, and warrants this Court's review. Respondent does not dispute that burglary is a common ACCA predicate, that the courts of appeals are divided on the question presented, or that three of those courts have deemed it sufficiently important to consider it en banc. Instead, he contends (Br. in Opp. 6-14) that the circuit conflict—which has widened since the petition for a writ of certiorari was filed—is not "mature" and that a decision in this case would not affect a significant number of state burglary provisions. Those contentions are incorrect.

a. Both the court below and other courts of appeals have recognized that the circuits are divided on the question presented. See Pet. App. 12a-13a (majority opinion); see also, *e.g.*, *Smith*, 877 F.3d at 724; *United States* v. *Sims*, 854 F.3d 1037, 1040 (8th Cir. 2017), petition for cert. pending, No. 17-766 (filed Nov. 21, 2017). The Fourth, Eighth, and Ninth Circuits have adopted the same cramped definition of generic burglary that the Sixth Circuit adopted here. See Pet. 18; *Sims*, 854 F.3d at 1039-1040; *United States* v. *White*, 836 F.3d 437, 445-446 (4th Cir. 2016); *United States* v. *Grisel*, 488 F.3d 844, 851 n.5 (9th Cir.) (en banc), cert. denied, 552 U.S. 970 (2007).[1] The Tenth Circuit, by contrast,

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[1] Respondent suggests (Br. in Opp. 11-12) that the Third and Eleventh Circuits also have held that the burglary of a nonperma-

has held that burglary of a "'vehicle that is adapted for the overnight accommodation of persons'" constitutes generic burglary because it is "analogous to the burglary of a building or house." *United States* v. *Spring*, 80 F.3d 1450, 1462 (citation omitted), cert. denied, 519 U.S. 963 (1996). The Fifth Circuit has also so held, although it has recently granted rehearing en banc on that question. See *United States* v. *Herrold*, 685 Fed. Appx. 302 (per curiam), reh'g en banc granted, 693 Fed. Appx. 272 (5th Cir. 2017).

Since the petition for a writ of certiorari was filed, the Seventh Circuit has likewise held that burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation can constitute burglary for purposes of the ACCA. In *Smith*, the court concluded that Illinois's residential burglary statute, which encompasses burglary of a "dwelling"—defined to include, *inter alia*, a "mobile home" or "trailer"—criminalizes generic burglary. 877 F.3d at 722 (quoting 720 Ill. Comp. Stat. Ann. 5/19-3(a) (West 1982); *id.* 5/2-6 (West 2016)). The court found it "unlikely" that *Taylor*, which "set out to create a federal common-law definition of 'burglary'" that would capture "'the generic sense in which the term is now used in the criminal

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nent or mobile structure adapted or used for overnight accommodation cannot constitute generic burglary for purposes of the ACCA. But the decisions respondent cites address statutes reaching nonpermanent or mobile structures adapted for carrying on business as well as for overnight accommodation. See *United States* v. *Bennett*, 100 F.3d 1105, 1109 (3d Cir. 1996); *United States* v. *Lockett*, 810 F.3d 1262, 1270 (11th Cir. 2016); *United States* v. *Howard*, 742 F.3d 1334, 1347-1349 (11th Cir. 2014); *United States* v. *Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010), cert. denied, 562 U.S. 1161 (2011). They therefore do not directly address the question presented here.

codes of most States,'" had "adopt[ed] a definition of generic burglary that is satisfied by no more than a handful of states—if by any." *Id.* at 723-724 (quoting *Taylor*, 495 U.S. at 598). The court also observed that "[i]f defendants in these cases are right, then the Justices *said* that they were following the Model Penal Code's approach but *did* the opposite." *Id.* at 725.

Although respondent acknowledges (Br. in Opp. 14) this division of authority, he attempts to minimize it. Respondent contends (*id.* at 9) that the Tenth Circuit's decision in *Spring*, *supra*, is "without support" because it relied on a Ninth Circuit decision that was later overruled in *Grisel*, *supra*, and a Fifth Circuit decision that may be affected by the en banc decision in *Herrold*, *supra*. But *Spring* stands on its own two feet, see 80 F.3d at 1462 (discussing *Taylor*), and the Tenth Circuit has applied its holding after *Grisel*. See *United States* v. *Patterson*, 561 F.3d 1170 (2009), cert. denied, 558 U.S. 1150 (2010). But see *United States* v. *Robinson*, No. 17-6046, 2018 WL 329053, at *5-*6 (10th Cir. Jan. 9, 2018) (Holmes, J., concurring) (questioning *Spring*'s "vitality").[2] In any event, as respondent recognizes

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[2] Nor is respondent correct (Br. in Opp. 10) that *Spring* and *United States* v. *Scoville*, 561 F.3d 1174 (10th Cir.), cert. denied, 558 U.S. 888 (2009), create "an intra-circuit conflict" that "should be addressed by the Tenth Circuit." *Scoville* considered a defendant's third-degree burglary convictions under Ohio law, which extended to certain nonpermanent and mobile "habitation[s]" if an individual was "present or likely to be present." 561 F.3d at 1179 & n.5 (quoting Ohio Rev. Code Ann. § 2911.12 (1993); *id.* § 2911.12 (1999)). *Scoville* stated without analysis that the governing statutes were "overbroad under *Taylor*," *id.* at 1179, but the court did not cite or attempt to distinguish *Spring*. The court in *Scoville* may have relied on an erroneous concession by the government that the third-

(Br. in Opp. 14), even if the Tenth Circuit's position were in doubt, the circuit conflict—which has expanded during the pendency of this petition—would remain.

b. Respondent separately contends (Br. in Opp. 6-7 & n.6) that the question presented does not warrant this Court's review on the theory that it would affect the classification of only six States' burglary statutes. According to respondent (*ibid.*), the other 38 jurisdictions whose burglary statutes covered nonpermanent or mobile structures as of 1986 currently "do not limit" those provisions to structures adapted or used for overnight accommodation.

Respondent miscalculates the number of state provisions at issue. He overlooks that jurisdictions often have multiple burglary statutes, with both a basic burglary law that extends broadly and (as in Tennessee's case) one or more aggravated versions that are limited to "dwellings" or "habitations." In fact, at least 20 jurisdictions currently define separate burglary offenses that reach only those nonpermanent or mobile structures that are adapted or used for overnight accommodation.[3] This Court's consideration of the question presented would thus resolve the classification of at least

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degree burglary statute was overbroad because it "address[ed] permanent or temporary habitations, which are not necessarily buildings, structures, or enclosed spaces (i.e. boats, vehicles, etc.)." Gov't Br. at 3, *Scoville*, *supra* (No. 07-8094); see *Scoville*, 561 F.3d at 1179.

[3] See Ala. Code § 13A-7-1(2) (LexisNexis Supp. 2017) (defining "dwelling"); *id.* § 13A-7-5(a) (LexisNexis 2015) (first-degree burglary of a "dwelling"); Alaska Stat. § 11.46.300 (2016) (first-degree burglary of a "dwelling"); *id.* § 11.81.900(a)(22) (defining "dwelling"); Ark. Code Ann. § 5-39-101(8)(A) (Supp. 2017) (defining "residential occupiable structure"); *id.* § 5-39-201(a) (2013) (burglary of a "residential occupiable structure"); Conn. Gen. Stat. Ann. § 53a-100(a)(2) (West 2012) (defining "dwelling"); *id.* § 53a-102 (second-

one burglary statute in at least 20 States, even if some of those States have other burglary statutes that cover

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degree burglary of a "dwelling"); Del. Code Ann. tit. 11, § 825(a)(1) (2015) (second-degree burglary of a "dwelling"); *id.* § 826 (first-degree burglary of a "dwelling"); *id.* § 829(b) (defining "[d]welling"); Ga. Code Ann. § 16-7-1(b) (Supp. 2017) (first-degree burglary of a "dwelling house" or other "structure designed for use as the dwelling of another"); Haw. Rev. Stat. Ann. § 708-800 (LexisNexis 2016) (defining "[b]uilding" and "[d]welling"); *id.* § 708-810 (first-degree burglary of a "building" or "dwelling"); 720 Ill. Comp. Stat. Ann. 5/2-6 (West 2016) (defining "dwelling"); *id.* 5/19-3 (West Supp. 2017) (residential burglary); Kan. Stat. Ann. § 21-5111(k) (Supp. 2016) (defining "[d]welling"); *id.* § 21-5807(a)(1) and (b)(1) (burglary of a "[d]welling" and aggravated burglary of a "[d]welling"); Ky. Rev. Stat. Ann. § 511.010(2) (LexisNexis 2014) (defining "[d]welling"); *id.* § 511.030 (second-degree burglary of a "dwelling"); Me. Rev. Stat. Ann. tit. 17-A, § 2(10) and (24) (Supp. 2017) (defining "[d]welling place" and "[s]tructure"); *id.* § 401(1)(A) and (B)(4) (burglary of a "structure" or "dwelling place"); Mich. Comp. Laws Ann. § 750.110a(1)(a) (West 2004) (defining "[d]welling"); *id.* § 750.110a(2) and (3) (first- and second-degree home invasion of a "dwelling"); N.Y. Penal Law § 140.00(3) (McKinney 2010) (defining "dwelling"); *id.* § 140.30 (first-degree burglary of a "dwelling"); N.D. Cent. Code §§ 12.1-05-12(2), 12.1-22-06(1) (2012) (defining "[d]welling"); *id.* § 12.1-22-02(1) (treating burglary of a "building or occupied structure" as a different class of felony if it occurs in a "dwelling"); Or. Rev. Stat. § 164.205(2) (2017) (defining "[d]welling"); *id.* § 164.225 (first-degree burglary of a "dwelling"); S.C. Code Ann. § 16-11-310(2) (2015) (defining "[d]welling"); *id.* § 16-11-311 (first-degree burglary of a "dwelling"); Tenn. Code Ann. § 39-14-401 (2014) (defining "[h]abitation"); *id.* § 39-14-403 (aggravated burglary of a "habitation"); Tex. Penal Code Ann. § 30.01(1) (West Supp. 2017) (defining "[h]abitation"); *id.* § 30.02(a) and (d)(1) (first-degree burglary of a "habitation"); Utah Code Ann. § 76-6-201(2) (LexisNexis 2017) (defining "[d]welling"); *id.* § 76-6-202(2) (second-degree felony burglary of a "dwelling"); W. Va. Code Ann. § 61-3-11(a)-(b) (LexisNexis 2014) (burglary of a "dwelling house"); *id.* § 61-3-11(c) (defining "dwelling house").

additional types of nonpermanent or mobile structures.[4] Moreover, a clarification of *Taylor* in this case could inform the classification of those other, broader statutes, whose ubiquity reinforces that "generic" burglary at a minimum encompasses the more limited type of statute at issue here.

3. Respondent errs in suggesting (Br. in Opp. 14-15) that this case is not a suitable vehicle for deciding the question presented. He contends (*ibid.*), for the first time in this Court, that even if burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation constitutes ACCA burglary, "Tennessee's aggravated burglary statute * * * still [would be] overbroad," on the theory that it "does not require a mental state for entering the habitation" and can be violated by "reckless conduct."

That contention, which confuses different portions of the ACCA's definition of a "violent felony," lacks merit. Petitioner cites decisions of this Court and the Sixth Circuit addressing whether crimes that can be committed recklessly or accidentally qualify as violent felonies under the ACCA's now-invalidated residual clause (covering offenses that "involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B)(ii)); its force clause (covering offenses that have "as an element the use, attempted use,

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[4] Respondent suggests (Br. in Opp. 7 & n.6) that *Taylor* determined that Texas's burglary statute was non-generic when it described Texas Penal Code Ann. §§ 30.01-30.05 (1989 & Supp. 1990) as "defining burglary to include theft from coin-operated vending machine[s] or automobile[s]." *Taylor*, 495 U.S. at 591. But *Taylor* did not specifically consider Texas Penal Code Ann. § 30.02(a) and (d)(1), which criminalizes burglary of a "[h]abitation," defined to include "a structure or vehicle that is adapted for the overnight accommodation of persons," *id.* § 30.01(1).

or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i)); or similarly worded clauses outside the context of the ACCA. See *Begay* v. *United States*, 553 U.S. 137, 145 (2008) (reckless conduct under residual clause); *Leocal* v. *Ashcroft*, 543 U.S. 1, 9-11, 13 (2004) (accidental conduct under 18 U.S.C. 16); *Jones* v. *United States*, 689 F.3d 621, 626 (6th Cir. 2012) (reckless conduct under force clause); see also *Johnson* v. *United States*, 135 S. Ct. 2551 (2015) (holding ACCA's residual clause unconstitutionally vague). But whether or not those clauses encompass reckless or accidental conduct, see *Voisine* v. *United States*, 136 S. Ct. 2272, 2276, 2278-2282 (2016) (holding that reckless conduct can constitute "use of physical force" under provision similar to the force clause), they are not at issue here.

This case instead turns on the meaning of "burglary" in the ACCA's enumerated-felonies clause, which defines "violent felony" to include any felony that "is burglary, arson, or extortion, [or] involves use of explosives," 18 U.S.C. 924(e)(2)(B)(ii). *Taylor* specifies only one *mens rea* requirement for ACCA "burglary," namely, that the "unlawful or unprivileged entry into, or remaining in, a building or structure" occur "with intent to commit a crime." 495 U.S. at 599. The Tennessee statute at issue here includes that same requirement: the defendant must enter or remain in a habitation without the owner's consent and "with the intent to commit" a crime. Tenn. Code Ann. § 39-14-402(a) (1997); see *id.* § 39-14-403; see also Br. in Opp. 16 (citing jury instructions). The court below concluded that the statute falls outside the definition of generic burglary solely on the ground that it applies to nonpermanent

and mobile dwellings. That erroneous conclusion warrants this Court's review.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

FEBRUARY 2018

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QUESTION PRESENTED

Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii).

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In the Supreme Court of the United States

No. 17-765

UNITED STATES OF AMERICA, PETITIONER

v.

VICTOR J. STITT, II

No. 17-766

UNITED STATES OF AMERICA, PETITIONER

v.

JASON DANIEL SIMS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURTS OF APPEALS
FOR THE SIXTH AND EIGHTH CIRCUITS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the en banc court of appeals in *United States* v. *Stitt*, No. 17-765 (*Stitt* Pet. App. 1a-55a) is reported at 860 F.3d 854. The opinion of the court of appeals panel (*Stitt* Pet. App. 56a-64a) is not published in the Federal Reporter but is reprinted at 637 Fed. Appx. 927.

The opinion of the court of appeals in *United States* v. *Sims*, No. 17-766 (*Sims* Pet. App. 1a-7a) is reported at 854 F.3d 1037.

JURISDICTION

The judgment of the court of appeals in *Stitt* was entered on June 27, 2017. On September 13, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including October 25, 2017. On October 13, 2017, Justice Kagan further extended the time to and including November 24, 2017, and the petition was filed on November 21, 2017. The petition for a writ of certiorari was granted on April 23, 2018.

The judgment of the court of appeals in *Sims* was entered on April 27, 2017. A petition for rehearing was denied on August 3, 2017 (*Sims* Pet. App. 8a). On October 20, 2017, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including December 1, 2017, and the petition was filed on November 21, 2017. The petition for a writ of certiorari was granted on April 23, 2018.

The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-20a.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, respondent Stitt was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 290 months of imprisonment, to be followed by four years of supervised release. *Stitt* Judgment 1-2. A panel of the court of appeals affirmed, but the en banc court vacated that decision and remanded for resentencing. *Stitt* Pet. App. 1a-64a.

Following a guilty plea in the United States District Court for the Eastern District of Arkansas, respondent Sims was convicted of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1). He was sentenced to 210 months of imprisonment, to be followed by three years of supervised release. *Sims* Judgment 1-3. The court of appeals vacated the sentence and remanded for resentencing. *Sims* Pet. App. 1a-7a.

A. Legal Background

1. In 1984, concerned that "a large percentage" of "crimes involving theft or violence" were "committed by a very small percentage of repeat offenders," Congress supplemented state law-enforcement efforts by "provid[ing] enhanced penalties for certain persons possessing firearms after three previous convictions" for certain crimes. H.R. Rep. No. 1073, 98th Cong., 2d Sess. 1 (1984) (House Report); see S. Rep. No. 190, 98th Cong., 1st Sess. 1, 5 (1983) (Senate Report). As originally enacted, the Armed Career Criminal Act of 1984 (ACCA) prescribed a 15-year minimum sentence for any person convicted of possession of a firearm by a felon following three prior convictions "for robbery or burglary." Pub. L. No. 98-473, Tit. II, ch. 18, 98 Stat. 2185 (18 U.S.C. App. 1202(a) (Supp. III 1985)) (repealed in 1986 by the Firearm Owners' Protection Act (FOPA), Pub. L. No. 99-308, § 104(b), 100 Stat. 459).

Congress focused on burglary and robbery because of their frequency and connection to violence. See, *e.g.*, Senate Report 3-5. The 1984 version of the ACCA defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. App.

1202(c)(9) (Supp. III 1985). "Congress singled out burglary * * * because of its inherent potential for harm to persons." *Taylor* v. *United States*, 495 U.S. 575, 588 (1990).

In 1986, Congress amended the ACCA to "expand[] the predicate offenses triggering the sentence enhancement from 'robbery or burglary' to 'a violent felony or serious drug offense.'" *Taylor*, 495 U.S. at 582; see Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39; 18 U.S.C. 924(e)(2)(B). The amended version of the statute, in effect today, defines a "violent felony" to include, *inter alia*, any crime punishable by more than one year that "is burglary, arson, or extortion, [or] involves use of explosives." 18 U.S.C. 924(e)(2)(B)(ii). But while retaining "burglary" as a specifically listed ACCA predicate, Congress deleted the previous statutory definition of that term.

2. In *Taylor*, *supra*, this Court was "called upon to determine the meaning of the word 'burglary' as it is used" in the amended version of the ACCA. 495 U.S. at 577. The Court held that "a person has been convicted of burglary for purposes of [an ACCA] enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599.

The Court in *Taylor* explained that its definition reflects "the generic sense in which the term [burglary] is now used in the criminal codes of most States." 495 U.S. at 598. The Court also explained that its definition of burglary "approximates" the one in the Model Penal Code, *id.* at 598 n.8, which, since 1980, has defined "bur-

glary" as the unauthorized entry of a "building or occupied structure * * * with purpose to commit a crime therein," Model Penal Code § 221.1(1) (1980). The term "occupied structure" in the Model Penal Code encompasses "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." *Id.* § 221.0(1). The Court in *Taylor* also referenced a leading criminal law treatise, which recognized that contemporary burglary statutes "typically describe the place [that is burglarized] as a 'building' or 'structure,'" 495 U.S. at 598 (quoting 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(c) (1986) (LaFave)), and that "these terms are often broadly construed," LaFave § 8.13(c).

Taylor instructed courts to employ a "categorical approach" to determine whether a prior conviction satisfies its definition of "burglary." 495 U.S. at 600. Under that approach, courts examine "the statutory definition[]" of the previous crime of conviction in order to determine whether it necessarily reflects conduct that constitutes the "generic" form of burglary referenced in the ACCA. *Ibid.* If the definition in the statute of conviction "substantially corresponds" to, or is narrower than, "generic" burglary as defined in *Taylor*, the prior offense categorically qualifies as a predicate conviction under the ACCA. *Id.* at 602. But if the statute of conviction is broader than the ACCA definition, the defendant's prior conviction does not qualify as ACCA burglary unless, under what is known as the "modified categorical approach," (1) the statute is "divisible" into multiple crimes with different elements, and (2) the government can show (using a limited set of record documents) that the jury necessarily found, or the defendant necessarily

admitted, the elements of generic burglary. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016); *Descamps* v. *United States*, 570 U.S. 254, 264 (2013); *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).

B. Proceedings In *Stitt*, No. 17-765

1. Offense conduct and initial proceedings

In 2011, during an argument with his girlfriend, respondent Stitt "tried to shove a loaded handgun into [her] mouth while threatening to kill her." *Stitt* Pet. App. 2a. A neighbor called the police, and Stitt fled to his mother's home. *Ibid.* Law enforcement officers followed Stitt, who surrendered to the authorities after a brief foot chase. *Ibid.*; see *id.* at 57a. Detectives recovered a .22-caliber handgun lying on the ground within Stitt's reach. *Id.* at 57a; see *id.* at 2a.

A federal grand jury indicted Stitt on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), and a jury found him guilty of that crime. *Stitt* Pet. App. 2a, 57a. At sentencing, the district court determined that Stitt had nine prior state convictions that qualified as "violent felonies" under the ACCA, *id.* at 2a, 57a-58a, including six prior convictions for aggravated burglary under Tennessee Code Annotated § 39-14-403(a) (1997). That statute criminalizes the burglary of any "[h]abitation," defined as (A) "any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons"; (B) any "self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant"; and (C) "each separately secured or occupied portion of the structure or vehicle and each structure appurtenant

to or connected with the structure or vehicle." *Id.* § 39-14-401(1) (Supp. 2001). The district court applied the ACCA and sentenced Stitt to 290 months of imprisonment. *Stitt* Pet. App. 2a.

A panel of the court of appeals affirmed Stitt's ACCA sentence. *Stitt* Pet. App. 56a-64a. The government acknowledged that this Court's decision in *Johnson* v. *United States*, 135 S. Ct. 2551, 2555-2556 (2015)—which held a distinct portion of the ACCA's definition of "violent felony," known as the "residual clause," to be unconstitutional—"invalidated the violent-felony status of three of [Stitt's] prior offenses, leaving only his six [Tennessee] aggravated-burglary convictions at issue." *Stitt* Pet. App. 2a-3a. Relying on circuit precedent, the court of appeals determined that a conviction under the Tennessee aggravated-burglary statute categorically qualifies as a conviction for generic burglary under the ACCA and that Stitt was therefore properly sentenced as an armed career criminal. *Id.* at 64a (citing *United States* v. *Priddy*, 808 F.3d 676, 684 (6th Cir. 2015); *United States* v. *Nance*, 481 F.3d 882, 887 (6th Cir.), cert. denied, 552 U.S. 1052 (2007)).

2. En banc proceedings

The court of appeals granted rehearing en banc. Over the dissent of six of the 15 judges who participated in the proceeding, the en banc majority overturned prior circuit law, concluded that the set of "habitation[s]" covered by the Tennessee aggravated-burglary statute extends beyond the "building[s] or other structure[s]" covered by the majority's interpretation of generic burglary, and remanded for the imposition of a non-ACCA sentence. *Stitt* Pet. App. 1a-55a.

a. The en banc majority concluded that no nonpermanent or mobile structure of any sort, including the

structures adapted for habitation that are protected by the Tennessee aggravated-burglary statute, can fit within *Taylor*'s reference to a "building or other structure," 495 U.S. 598. The majority reasoned that "[a]lthough the Court left 'building or other structure' undefined" in *Taylor*, "it has confirmed repeatedly that vehicles and movable enclosures (e.g., railroad cars, tents, and booths) fall outside the definitional sweep" of that phrase. *Stitt* Pet. App. 4a; see *id.* at 4a-5a (citing *Mathis*, 136 S. Ct. at 2250; *Nijhawan* v. *Holder*, 557 U.S. 29, 35 (2009); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186-187 (2007); *Shepard*, 544 U.S. at 15-16; *Taylor*, 495 U.S. at 599); see also *id.* at 6a-7a. The majority discounted the particular habitation-related limitations of the Tennessee statute on the theory that *Taylor*'s definition of generic burglary "emphasizes a place's form and nature—not its intended use or purpose." *Id.* at 5a; see *id.* at 5a-7a.

The majority recognized that *Taylor* had described what "Congress meant by 'burglary'" in the ACCA as "the generic sense in which the term is now used in the criminal codes of most states." *Stitt* Pet. App. 7a (quoting *Taylor*, 495 U.S. at 598). And the majority took note of a multijurisdictional analysis submitted by the government for the purpose of illustrating that, when *Taylor* was decided, the "overwhelming majority of states included vehicles and movable enclosures in their burglary statutes" and that "a little more than half the states' burglary statutes specifically 'covered movable structures adapted for specific purposes such as overnight accommodation, business, or education.'" *Id.* at 7a-8a. The majority also recognized that *Taylor* had likened the ACCA definition of burglary to the Model Pe-

nal Code's definition, which included "occupied structures" of the sort covered by the Tennessee law. *Id.* at 8a. But the majority nevertheless viewed *Taylor*'s "clear and unambiguous language," and the Court's "repetition of similar language in later cases," to "exclude[] *all* things mobile or transitory." *Ibid.*

b. Five judges joined one or both of two concurrences.

Judge Boggs authored a concurrence disagreeing with certain points in the dissent, namely, that the ACCA definition of burglary is "broader" than the common-law definition, that the common-law definition applied to dwellings including vehicles adapted for overnight accommodation, and that burglary of a habitation "was a kind of burglary that the *Taylor* Court would have counted as a 'generic' ACCA burglary." *Stitt* Pet. App. 16a-17a; see *id.* at 19a-26a. Although Judge Boggs viewed the majority's result as "compelled by *Taylor*," *id.* at 26a (emphasis omitted), he nonetheless acknowledged that the majority's holding would (in conjunction with other ACCA decisions) lead to "bizarre results." *Ibid.*

Judge White joined Judge Boggs's concurrence and also filed a separate concurring opinion arguing, in response to the dissent, that common-law burglary did not protect tents and vehicles. *Stitt* Pet. App. 33a-43a. Judge White acknowledged, however, that "[w]hether Tennessee's aggravated-burglary offense and similarly-defined offenses fall within Congress's concept of generic burglary" is a "difficult" question with "[p]ersuasive arguments * * * on both sides." *Id.* at 43a; see *ibid.* ("For me, the Model Penal Code's expansive definition of 'occupied structure' provides the strongest support for the dissent."). Like Judge Boggs, *id.* at 26a,

Judge White observed that the court of appeals' decision would "lead[] to some puzzling results." *Id.* at 42a.

c. Judge Sutton, joined by five other judges, dissented. *Stitt* Pet. App. 43a-55a. He reasoned that Tennessee's aggravated-burglary crime necessarily qualified as generic burglary, because generic burglary is broader than the common-law definition of burglary, and the locational element of common-law burglary encompassed "dwellings"—including the sorts of habitations covered by the Tennessee law. *Id.* at 43a-46a. Judge Sutton explained that the concurring opinions' contrary assertions erroneously looked to Blackstone-era common law instead of the "common law in 1984, when Congress enacted the Armed Career Criminal Act." *Id.* at 53a. "By then," he observed, "the consensus of the state courts—the true authorities on American common law—was that tents and vehicles designed and used for human accommodation count as dwellings." *Ibid.* (citing examples).

Judge Sutton also observed that Tennessee's aggravated-burglary offense (1) mirrors the Model Penal Code's definition of "occupied structure," which *Taylor* cited in describing the elements of generic burglary; (2) matches the traditional meaning of "dwelling house" in *Black's Law Dictionary*; and (3) is consistent with federal cases holding that the term "burglary of a dwelling," as used in former Sentencing Guidelines § 4B1.2 (2015), reached vehicles and tents designed for human habitation. *Stitt* Pet. App. 46a-47a (citations omitted). Judge Sutton reasoned that because "*Taylor* tells us that burglary of a dwelling is always generic, and a uniform body of precedent tells us that Tennessee's definition of 'habitation' applies only to dwellings[,] * * * [t]he statute is generic" and Stitt's

convictions under it qualify as violent felonies. *Id.* at 47a-48a.

Judge Sutton criticized the majority for taking out of context statements by this Court that burglary statutes that "includ[e] places, such as automobiles and vending machines" cover more locations than generic burglary. *Stitt* Pet. App. 48a (quoting *Taylor*, 495 U.S. at 599). He observed that those statements had not addressed statutes limited to the burglary of dwellings. *Id.* at 48a-49a. And he admonished the majority for "isolat[ing] three words from *Taylor*, lift[ing] them from their context, and in the process eliminat[ing] common law burglary of a dwelling, which *Taylor* tells us * * * is the heart of the crime," from the scope of ACCA burglary. *Id.* at 50a-51a.

Judge Sutton added that that the majority's conclusion "produces th[e] head-scratching outcome" that "Tennessee's lesser crime of 'burglary of a building' qualifies as generic burglary while aggravated burglary"—*i.e.*, burglary of a habitation—"does not." *Stitt* Pet. App. 50a. He also observed that, under the majority's view, a statute that covers "burglary of unoccupied * * * tool sheds" would constitute ACCA burglary, but a statute that "covers places where people regularly lodge" would not. *Ibid.*

C. Proceedings In *Sims*, No. 17-766

In January 2014, respondent Sims broke into a home in St. Francis County, Arkansas, and stole a rifle. *Sims* Pet. for Reh'g 3. A federal grand jury indicted Sims on one count of possession of a firearm by a felon, in violation of 18 U.S.C. 922(g)(1), and Sims pleaded guilty to that crime. *Sims* Pet. App. 1a.

At sentencing, the district court determined that, in addition to two prior convictions for "serious drug

offenses" under the ACCA, Sims had two prior convictions for "violent felonies," *Sims* Pet. App. 2a—specifically, two convictions for residential burglary under Arkansas Code Annotated § 5-39-201(a)(1). That statute criminalizes burglary of a "residential occupiable structure," *ibid.*, defined as "a vehicle, building or other structure: (i) In which any person lives; or (ii) That is customarily used for overnight accommodation of a person whether or not a person is actually present," *id.* § 5-39-101(4)(A) (2013).[1] The court applied the ACCA and sentenced Sims to 210 months of imprisonment. *Sims* Pet. App. 3a.

The court of appeals vacated Sims's sentence and remanded for resentencing. *Sims* Pet. App. 1a-7a. As in the district court, Sims did not contest that his two prior drug offenses constituted "serious drug offenses" under the ACCA, see *id.* at 2a-3a, but he argued that his Arkansas convictions for residential burglary did not qualify as "violent felon[ies]," see *id.* at 4a. The court of appeals agreed with Sims, concluding that "Arkansas residential burglary categorically sweeps more broadly than generic burglary" because it covers vehicles used or adapted for overnight accommodation. *Id.* at 6a. In

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[1] The court of appeals cited the 2013 version of Arkansas Code Annotated §§ 5-39-101 and 5-39-201. See *Sims* Pet. App. 3a. The versions of those provisions that were in place at the time of Sims's burglary offenses differed slightly. In particular, Section 5-39-101 defined a "[r]esidential occupiable structure" as "a vehicle, building, or other structure (A) Where any person lives; or (B) Which is customarily used for overnight accommodation of persons whether or not a person is actually present." Ark. Code Ann. § 5-39-101(1) (Michie 1997). Both the 2013 and 1997 versions of the statutes are included in the appendix to this brief. App., *infra*, 16a-20a. Because the changes are immaterial to the question presented, this brief cites the 2013 versions of the statutes cited by the court of appeals.

the court's view, no burglary statute encompassing vehicular burglary can qualify as "burglary" under the ACCA, even if the statute is limited to burglary of vehicles used as homes. *Ibid.*

The court of appeals acknowledged that the government's position—that the Arkansas statute qualifies as generic burglary because it is limited to vehicles "'[i]n which any person lives'" or "'[t]hat [are] customarily used for overnight accommodation'"—is "not an unreasonable one" and that "this issue has divided circuit courts." *Sims* Pet. App. 5a (quoting Ark. Code Ann. § 5-39-101(4)(A) (2013)) (brackets in original). But the court stated that it was "not writing on a blank slate." *Ibid.* Instead, the court deemed itself bound by its decision in *United States* v. *Lamb*, 847 F.3d 928 (8th Cir. 2017), cert. denied, 138 S. Ct. 1438 (2018), which had stated that a Wisconsin statute "encompasse[d] a broader range of conduct than generic burglary as defined in *Taylor*" because it covered "burglary of railroad cars, ships, trucks, and motor homes." *Id.* at 931. The court concluded that *Lamb*'s reference to motor homes "foreclose[d] the Government's argument" that Arkansas residential burglary—which is narrower than the Wisconsin statute in many respects but likewise covers motor homes—categorically fits within the generic *Taylor* definition. *Sims* Pet. App. 6a.

The court of appeals denied the government's petition for rehearing en banc, over the dissent of two judges. *Sims* Pet. App. 8a.

SUMMARY OF ARGUMENT

The courts of appeals erred in excising burglary of a nonpermanent or mobile structure that is used or adapted for overnight accommodation from the definition of "burglary" under the ACCA. Their holdings are

inconsistent with this Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990); draw improper distinctions between homes a burglar might target for invasion; and all but nullify a critical statutory term.

A. In *Taylor*, this Court construed "burglary" under the ACCA in "the generic sense in which the term is now used in the criminal codes of most States" to include "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." 495 U.S. at 598-599. The "criminal codes of most States" in 1986—specifically, 43 States, plus the District of Columbia—had burglary laws protecting the types of mobile or nonpermanent homes at issue here. *Taylor*'s definition of burglary thus necessarily reflects that overwhelming consensus.

Taylor, moreover, likened its definition of burglary to the Model Penal Code's, which since 1980 has encompassed burglary of a "building or occupied structure," with "occupied structure" defined as "any structure, vehicle, or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present," Model Penal Code §§ 221.0(1), 221.1(1) (1980); see *Taylor*, 495 U.S. at 598 n.8. *Taylor* also relied on Professor LaFave's treatise on the substantive criminal law, which emphasized the breadth of the terms "building" and "structure" in the burglary context and described the burglary statutes of 13 States that covered nonpermanent or mobile structures adapted or used for overnight accommodation as "typical[]." LaFave § 8.13(c); see *Taylor*, 495 U.S. at 598.

Taylor also emphasized that Congress, in enacting and expanding the ACCA, expressed specific concern

with burglary's "inherent potential for harm to persons," which it recognized to be particularly acute in the context of a home invasion. 495 U.S. at 588. The inherent danger of a home invasion exists to an equal, if not greater, degree when a burglar invades a mobile home as when he invades a mansion. Nothing suggests that Congress disagreed with the predominant view of the States that each homeowner deserves the protection of the burglary laws, or that Congress otherwise saw fit to differentiate between types of homes when it used the term "burglary" in its "generic sense," *id.* at 598.

Far from limiting "burglary" to only a subset of homes, *Taylor* deliberately adopted a definition of burglary that went well ***beyond*** the home invasions that were the "core" of traditional common-law burglary. 495 U.S. at 580 n.3, 593. As Judge Sutton recognized, *Taylor*'s modernization of the locational element of burglary to include "any building or structure," rather than simply a "dwelling house," necessarily reflects a modernization of the types of home invasions that have always been at the "heart of the crime." *Stitt* Pet. App. 51a. Indeed, targeting of a home is frequently a factor that triggers the application of "aggravated-burglary statutes," 495 U.S. at 596, which *Taylor* took as a given would qualify as "burglary" under the ACCA.

B. The Tennessee and Arkansas provisions at issue here are classic prohibitions against home invasions that are equivalent to or narrower than all but a small handful of state burglary statutes in existence in 1986. The courts of appeals' reasons for nonetheless excluding them from the ACCA do not withstand scrutiny.

The courts below seized on *Taylor*'s statement that "[a] few States' burglary statutes * * * define[d] burglary more broadly, *e.g.*, by * * * including places, such

as automobiles and vending machines, other than buildings," 495 U.S. at 599. But the Court's reference to "[a] few" burglary laws that cover "automobiles" cannot be construed to exclude the basic burglary statutes of the vast majority of States from a definition of "burglary" that was specifically based on the definition of burglary adopted by "most States," *id.* at 598. The majority in *Stitt* also read into *Taylor*'s definition of burglary a focus on "a place's form and nature" rather than "its intended use or purpose." *Stitt* Pet. App. 5a. Such a distinction, however, not only lacks support in *Taylor* itself, but also fails to recognize that form and function are inextricably intertwined, as when potential or actual human occupancy necessitates changes to layout or design that relate directly to the danger of a burglary. Finally, the majority in *Stitt* erroneously relied on the definition of "burglary" in the 1984 definition of the ACCA, which Congress deleted, to override the operative definition of burglary that *Taylor* in fact provided. That broad state-consensus-based definition should not be constr[illegible]d to cover only a handful of state crimes.

ARGUMENT

BURGLARY OF A NONPERMANENT OR MOBILE STRUCTURE THAT IS ADAPTED OR USED FOR OVERNIGHT ACCOMMODATION QUALIFIES AS "BURGLARY" UNDER THE ACCA

In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court defined "burglary" under the ACCA in accordance with the "sense in which the term is now used in the criminal codes of most States," *id.* at 598. The decisions below, however, have done the opposite. Both at the time the relevant language was enacted and now, most States have classified intrusion into nonpermanent or mobile structures adapted or used for overnight

accommodation as burglary. By construing "burglary" to exclude state laws that prohibit such conduct, the decisions below have cut out the "heart" of the crime—burglary of a habitation—and whittled the term down to near-obsolescence. *Stitt* Pet. App. 50a-51a (Sutton, J., dissenting). That result cannot be squared with *Taylor*; with Congress's specific focus on the potential for a violent confrontation between a burglar and the "occupants of [a] home," *Taylor*, 495 U.S. at 581 (quoting Senate Report 3-5); or with the widespread and commonsense judgment that home invasion is the same crime irrespective of whether the home is a trailer or a mansion.

A. *Taylor*'s Definition Of Generic "Burglary" Encompasses The Invasion Of Nonpermanent Or Mobile Dwellings

In *Taylor*, this Court explained that "burglary" under the ACCA includes "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." 495 U.S. at 599. In formulating that definition, the Court relied on contemporary state laws, the Model Penal Code, and Professor LaFave's treatise on substantive criminal law. *Id.* at 598 & n.8. The Court emphasized Congress's intent to include a wide range of potentially violent invasions and rejected alternative definitions as too narrow. *Id.* at 593-597. Each of those considerations demonstrates that burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation is "burglary" under the ACCA.

1. The contemporary state-law definitions reflected in Taylor's definition typically covered burglary of nonpermanent or mobile dwellings

The Court in *Taylor* determined that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. The Court explained that, "[a]lthough the exact formulations vary," an examination of such laws revealed a "generic, contemporary meaning of burglary." *Ibid.* It accordingly derived its definition of ACCA burglary from the "basic elements," including the locational elements, of contemporary state crimes. *Id.* at 599.

No definition of burglary reflecting the locational element of "most States," *Taylor*, 495 U.S. at 598, could exclude burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation. As the government's appendix to this brief illustrates, at the time of the 1986 ACCA amendments, an overwhelming majority of jurisdictions—43 States and the District of Columbia—had at least one burglary statute that protected nonpermanent or mobile structures, such as vehicles, boats, and tents, adapted or used as dwellings, in addition to permanent residences and other buildings. App., *infra*, 21a-38a. Those 44 jurisdictions include 25 that specifically delineated such structures (and, in some cases, other specialized structures), as well as 19 that had expanded their statutes to nonpermanent or mobile structures more generally. See *ibid.* In the vast majority of cases, burglary of a nonpermanent or mobile structure adapted or used for overnight accommodation was covered by a State's basic burglary statute; often, such burglary also could

be charged under an aggravated or first-degree burglary statute that covered the burglary of a "dwelling." Thus, even assuming arguendo that ACCA "burglary" is narrower than certain state statutes in some respects, see pp. 33-36, *infra*, any analysis of the common area of overlap would include the sorts of structures at issue here.

The broad consensus in 1986 that burglary included nonpermanent or mobile structures adapted or used for overnight accommodation was a manifestation of the widespread judgment that burglary law "protects the humble tenant in his tent as well as his more fortunate neighbor in his palace." *Favro* v. *State*, 46 S.W. 932, 933 (Tex. Crim. App. 1898); see also *Stitt* Pet. App. 53a (Sutton, J., dissenting) (observing that by 1984, "the consensus of the state courts * * * was that tents and vehicles designed and used for human accommodation count as dwellings" that may be burglarized); *Kanaras* v. *State*, 460 A.2d 61, 71 (Md. Ct. Spec. App. 1983) ("[T]he crucial factor in determining whether a particular enclosure is a dwelling house is not whether the location is a formal traditional mortar and brick type of structure, but rather whether it is a place intended to be used, and in fact is used, as an abode and place for humans to sleep."); *People* v. *Netznik*, 383 N.E.2d 640, 643 (Ill. App. Ct. 1978) ("[T]he provision was intended to secure the person or property of a tent-dweller or camper in the use of his tent to the same extent it secures that of an owner in the use of his house, church or shop."); *People* v. *Winhoven*, 237 N.W.2d 540, 542-543 (Mich. Ct. App. 1975) ("When a mobile home is used as a person's principal residence, it more nearly fits within the meaning of the dwelling house statute than the house trailer statute.") (footnote omitted).

That makes good sense, as the degree of danger and culpability associated with the burglary of someone's home does not turn on whether the home is permanently tethered to the ground. See pp. 24-27, *infra*. The decisions below erred in viewing Congress to have silently rejected the considered approach of nearly every State in favor of an idiosyncratic one under which the lion's share of state burglary laws would not be "burglary." Such a constricted definition does not reflect "the generic sense in which the term is now used in the criminal codes of most States," *Taylor*, 495 U.S. at 598, and it cannot be squared with *Taylor*. See, *e.g.*, *id.* at 593 (rejecting common-law definition of burglary "because few of the crimes now generally recognized as burglaries would fall within the common-law definition").

2. The secondary sources on which Taylor relied confirm that ACCA burglary covers nonpermanent or mobile dwellings

In deriving its "generic contemporary meaning of burglary" from the definitions employed by the States, *Taylor* examined both the Model Penal Code and the 1986 edition of Professor LaFave's treatise on substantive criminal law. See 495 U.S. at 598 & n.8. Each of those sources reinforces that *Taylor*'s definition of the locational element of ACCA burglary to include a "building or structure" encompasses nonpermanent or mobile structures adapted or used for overnight accommodation.

a. *Taylor* explained that its definition of generic burglary "approximate[d] [the definition] adopted by the drafters of the Model Penal Code." 495 U.S. at 598 n.8. The Code's definition confirms that *Taylor*'s definition covers the type of structures at issue here.

Since 1980, the Model Penal Code has described burglary as the unlawful entry into "a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein." Model Penal Code § 221.1(1). The phrase "occupied structure," in turn, has encompassed "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." *Id.* § 221.0(1).

The Code's commentary makes clear that, although that definition would not cover burglary of an ordinary motor vehicle or freight car, it would cover burglary of a habitable vehicle like a trailer home. Model Penal Code § 221.1 cmt. 3(b) (1980). The commentary acknowledged that the Code's definition provided "considerably narrower coverage than was achieved by many of the statutes in effect at the time the Model Code was drafted [in 1980], which often extended burglary law to *any* structure or vehicle." *Ibid.* (emphasis added). But even the Code's more limited approach included burglary of locations with "apparent potential for regular occupancy," which the drafters (in accord with state legislatures) viewed as the "intrusions that are typically the most alarming and dangerous." *Ibid.*

Taylor's endorsement of the Model Penal Code's definition of burglary indicates that its similar definition of generic burglary under the ACCA likewise includes vehicles that serve as a person's home. 495 U.S. at 598 n.8; see *Stitt* Pet. App. 43a (White, J., concurring) (acknowledging that "the Model Penal Code's expansive definition of 'occupied structure' provides the strongest support" for the proposition that "generic burglary" protects "such temporary structures as tents and vehicles * * * when used as a habitation."). The contrary

view of the courts below would mean that "the Justices [in *Taylor*] *said* that they were following the Model Penal Code's approach but *did* the opposite," eliminating much of the conduct covered by the Code from the reach of ACCA burglary. *Smith* v. *United States*, 877 F.3d 720, 725 (7th Cir. 2017), petition for cert. pending, No. 17-7517 (filed Jan. 17, 2018). *Taylor*'s definition of burglary—which mirrored the Code's definition, while dropping the "narrow[ing]" language requiring that a "structure" be "occupied," Model Penal Code § 221.1 cmt. 3(b); see *Taylor*, 495 U.S. at 598—should not be read as more limited than the Code's in any relevant respect.

b. *Taylor*'s reliance on Professor LaFave's treatise likewise reinforces the breadth of the phrase—"'building' or 'structure,'" 495 U.S. at 598—that *Taylor* adopted to describe ACCA burglary's locational element.

Taylor cited Section 8.13(c) of the treatise for the proposition that "modern statutes 'typically describe the place [of a burglary] as a "building" or "structure."'" 495 U.S. at 598 (quoting LaFave § 8.13(c)). The LaFave treatise, in turn, observed that those terms "are often broadly construed." LaFave § 8.13(c) & nn.81-82. And the treatise's discussion of those terms confirms that they would encompass nonpermanent or mobile structures adapted or used for overnight accommodation.

In discussing the locational element of "building" or "structure," the LaFave treatise identified statutes from 13 States—Alaska, Arizona, Connecticut, Florida, Georgia, Iowa, Louisiana, Missouri, Montana, New Hampshire, New Jersey, Oregon, and Wyoming—as "typical[]." LaFave § 8.13(c) & nn.81-82. At the time, 12 of those "typical[]" 13 States' burglary statutes included as a type of "building," "structure," "occupied

structure," or "inhabitable structure" at least those nonpermanent or mobile structures adapted or used for overnight accommodation. See App., *infra*, 21a-38a; Ga. Code Ann. § 26-1601 (1983) (defining "burglary" as occurring within "the dwelling house of another or any building, vehicle, railroad car, watercraft or other such structure designed for use as the dwelling of another," or "any other building, railroad car, aircraft, or any room or any part thereof"); see also *United States* v. *Grisel*, 488 F.3d 844, 857 n.7 (9th Cir.) (en banc) (Bea, J., dissenting), cert. denied, 552 U.S. 970 (2007). The 13th State, Florida, also criminalized the burglary of such locations, albeit using the term "conveyance." Fla. Stat. § 810.02(1) (1985) (defining "[b]urglary" to include the "entering or remaining in a structure or a conveyance with the intent to commit an offense therein"); *id.* § 810.011(1) (defining "[s]tructure" as "a building of any kind, either temporary or permanent, which has a roof over it, together with the curtilage thereof"); *id.* § 810.011(3) (defining "[c]onveyance" as "any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car").

Notwithstanding that *none* of the statutes that the LaFave treatise described as "typical[]" limited burglary to permanent or immovable buildings or structures, the majority in *Stitt* nonetheless viewed the treatise to support such a limitation. See *Stitt* Pet. App. 10a-11a. It focused (*ibid.*) on the fact that the treatise, after explaining that modern statutes "typically describe the place [that is burglarized] as a 'building' or 'structure,'" stated that some jurisdictions had extended their "burglary statutes * * * to still other places, such as all or some types of vehicles." LaFave § 8.13(c).

The *Stitt* majority erred in viewing that latter statement as a late-breaking repudiation of the treatise's earlier empirical examination of the "typical[]" breadth of the terms "building" and "structure." LaFave § 8.13(c). Instead, the treatise is best read as distinguishing between statutes that cover vehicular homes, of which the treatise approved, and those that cover *all* vehicles, of which it did not. The treatise recognized that covering vehicles "may make sense in some circumstances, as where the vehicle is a motor home." LaFave § 8.13(c) n.85. The treatise then cited, as a model example, a Wisconsin burglary statute that protected, among other locations, "[a] motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home." Wis. Stat. Ann. § 943.10(1)(e) (West 1982); see *id.* § 340.01(33m) (West 1971) (defining "[m]otor home" as "a motor vehicle designed to be operated upon a highway for use as a temporary or recreational dwelling and having the same internal characteristics and equipment as a mobile home"). By contrast, the LaFave treatise provided a single example of a "situation[that] ought not be treated as burglary"—namely, a case involving a defendant's "opening [the] hood of [a] car and taking [the] battery." LaFave § 8.13(c) n.85 (citing *State* v. *Pierre*, 320 So. 2d 185 (La. 1975)). Those facts fall far afield from anything at issue here.

3. Taylor's discussion of the ACCA's design reinforces that its definition of burglary covers nonpermanent or mobile dwellings

Taylor's definition of generic burglary also took account of Congress's design in enacting and expanding

the ACCA. That consideration, as well, supports the inclusion of mobile or nonpermanent dwellings within the locational element of ACCA burglary.

As the Court in *Taylor* explained, Congress in 1984 was disturbed by statistics showing that a relatively small number of career criminals commit a large percentage of burglary and robbery offenses. See 495 U.S. at 581. Congress thus singled out those two offenses as sentence-enhancing predicates in the original version of the ACCA. See ACCA, 98 Stat. 2185 (repealed by FOPA § 104(b), 100 Stat. 459). And when Congress amended ACCA's list of explicitly included offenses in 1986, it maintained burglary as the first such crime. See 18 U.S.C. 924(e)(2)(B)(ii) (listing "burglary, arson, * * * extortion," and offenses "involv[ing] use of explosives").

Taylor explained that Congress focused on burglary because of the crime's "inherent potential for harm to persons," 495 U.S. at 588, especially in the context of home invasions. Congress viewed burglary as "one of the 'most damaging crimes to society' because it involves 'invasion of [victims'] homes or workplaces, violation of their privacy, and loss of their most personal and valued possessions.'" *Id.* at 581 (quoting House Report 3). And Congress recognized that burglary offenses create the possibility of violent confrontation "depending on the fortuitous presence of the occupants of the home when the burglar enters." *Ibid.* (quoting Senate Report 4); see *id.* at 585 (discussing similar statements during hearings on 1986 amendments). Congress accordingly ensured that a history of such offenses would trigger enhanced punishment under the ACCA. See *id.* at 581-582.

Congress's concerns about home invasions apply equally to the invasion of a mobile home as to the invasion of a colonial-style house. Excluding the former from

the scope of ACCA burglary would leave an untenable gap in the statutory definition of a crime that is committed millions of time times per year and is a common ACCA predicate. See Bureau of Justice Statistics, Office of Justice Programs, U.S. Dep't of Justice, *Victimization During Household Burglary* 1 (Sept. 2010), https://www.bjs.gov/content/pub/pdf/vdhb.pdf) (noting that an estimated 3.7 million burglaries occurred each year on average from 2003 to 2007). Approximately 8.5 million of the housing units in the United States (roughly 6.4% of all such units) are mobile homes. See American FactFinder, U.S. Census Bureau, *Selected Housing Characteristics, 2011-2015 American Community Survey 5-Year Estimates* 1, http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk. And studies suggest that mobile homes are just as likely as immovable dwellings to be the target of a violent crime or property offense. See William P. McCarty, *Trailers and Trouble? An Examination of Crime in Mobile Home Communities*, Cityscape: A Journal of Policy Development and Research, Vol. 12, No. 2, at 137 (2010) (finding "no statistically significant difference in the rates of crime between blocks with mobile home communities, blocks adjacent to mobile home communities, and all other residential blocks" in Omaha, Nebraska), https://www.huduser.gov/portal/periodicals/cityscpe/vol12num2/ch7.pdf.

Home invasion is in no way a lesser crime when the home is nonpermanent or can be moved. To the contrary, "the unique wounds caused by residential burglary are independent of the size or construction of the dwelling. They are the same for the mansion house and the boarding house, the tract home and the mobile

home." *United States* v. *Rivera-Oros*, 590 F.3d 1123, 1130 (10th Cir. 2009). Indeed, "the burglary of a mobile home or camper is often likely to pose a *greater* risk of violence to the occupant or owner than the burglary of a building or house because it is more difficult for the burglar to enter or escape unnoticed." *United States* v. *Spring*, 80 F.3d 1450, 1462 (10th Cir.) (citation omitted) (emphasis added), cert. denied, 519 U.S. 963 (1996). Thus, Congress would have had no reason to think that habitual criminals who burglarize nonpermanent or mobile homes are any less dangerous or deserving of punishment than those who burglarize other types of homes. Cf. *Collins* v. *Virginia*, 138 S. Ct. 1663, 1675 (2018) (rejecting proposed rule that would have made the degree of Fourth Amendment protection turn on whether the homeowner has "the financial means to afford [a] residence[] with [a] garage[]").

4. Taylor's rejection of limiting constructions of "burglary" supports a similar rejection of the limiting construction adopted below

In defining "burglary" for purposes of the ACCA, *Taylor* rejected narrower interpretations that had been adopted by some courts of appeals and advanced by the petitioner in that case. 495 U.S. at 591-598. Its reasons for doing so support a similar rejection of the cramped interpretation adopted by the courts below here.

a. *Taylor* first rejected the approach of courts of appeals that had limited ACCA burglary to "the common-law definition" of the crime, 495 U.S. at 593, *i.e.*, "the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony," *id.* at 580 n.3 (citation omitted). The Court acknowledged that the approach "ha[d] some appeal, in that common-law burglary is the core, or common denominator, of the

contemporary usage of the term." *Id.* at 592. But the Court in *Taylor* found it too narrow, observing that the "arcane distinctions embedded in the common-law definition have little relevance to modern law enforcement concerns" that animated the ACCA. *Id.* at 593. The Court additionally observed that because most States had expanded their definitions of burglary to cover, for example, "structures other than dwellings," "few of the crimes now generally recognized as burglaries would fall within the common-law definition." *Id.* at 593-594.

As Judge Sutton explained in his dissenting opinion in *Stitt*, *Stitt* Pet. App. 45a-46a, 52a-55a, the problem *Taylor* identified with limiting ACCA burglary to its common-law "core," 495 U.S. at 592, exists to an even greater degree in the limiting construction adopted by the courts below in these cases. Even with all of the constraints on common-law burglary, its locational element still encompassed "dwellings." *Id.* at 592-593. The ancient English interpretation of "dwellings" included certain archaic limitations: Blackstone, for example, excluded "tents erected in public markets," *Stitt* Pet. App. 53a (Sutton, J., dissenting), and, "for obvious reasons," "no account" of the ancient English "common law discusses mobile homes and self-propelled vehicles," *id.* at 41a (White, J., concurring). But by the time Congress enacted the ACCA in 1984, "there was no question that tents and vehicles designed and used for human accommodation qualified as dwellings." *Id.* at 54a (Sutton, J., dissenting); see *ibid.* ("Let them live in 'mansion houses' may have been an answer to those who wanted the protection of the burglary laws for lesser dwellings a long time ago. But that has not been true for many decades.").

Taylor's construction of ACCA burglary to reflect modern law's expansion of that crime to "structures *other than* dwellings," 495 U.S. at 593 (emphasis added), necessarily suggests that ACCA burglary incorporates the more expansive modern view of "dwellings" as well. As the Court recognized in *Taylor*, "[w]hatever else the Members of Congress might have been thinking of, they presumably had in mind at least the 'classic' common-law definition when they considered the inclusion of burglary as a predicate offense." *Ibid.* It would be anomalous to construe generic burglary to encompass a vast number of *non*-dwellings, while declining to recognize that modern law, technology, and practices have expanded generic burglary's dwelling-focused "core" as well. *Taylor*'s analysis dictates that Congress must have intended, at a minimum, for burglary of a modern-day dwelling to be burglary under the ACCA. See *United States* v. *Herrold*, 883 F.3d 517, 550 (5th Cir. 2018) (Haynes, J., dissenting) (reasoning that "excluding a dwelling on the basis of whether it has (or, at some time, had) wheels" would be "invoking one of those very 'arcane technicalities'" of the common-law that *Taylor* rejected), petition for cert. pending, No. 17-1445 (filed Apr. 18, 2018), and petition for cert. pending, No. 17-9127 (filed May 21, 2018).

b. *Taylor* also rejected a "narrowing construction of the term 'burglary,'" offered by the petitioner in that case, that would have limited it to crimes that have "'as an element necessary for conviction conduct that presents a serious risk of physical injury to another.'" 495 U.S. at 596 (citation omitted). The petitioner provided, as "examples * * * that would fit" his definition, "first-degree or aggravated-burglary statutes having elements such as entering an occupied building; being

armed with a deadly weapon; or causing or threatening physical injury to a person." *Ibid.* The Court acknowledged that the petitioner's interpretation would "restrict[] the predicate offense in a manner congruent with the general purpose of the enhancement statute," but it nonetheless rejected the approach as "not supported by the language of the statute or the legislative history." *Id.* at 596-597. In particular, while Congress no doubt intended to capture such "aggravated" or "especially dangerous" burglaries as ACCA predicates, it "presumably realized that the word 'burglary' is commonly understood to include not only [those] aggravated burglaries, but also run-of-the-mill burglaries." *Id.* at 597.

The home-invasion form of burglary at issue here is precisely the sort of "aggravated" or "especially dangerous" type of burglary, *Taylor*, 495 U.S. at 596-597, whose inclusion under the ACCA was taken as a given in *Taylor*. It is "common for burglary statutes to provide that if the offense was against a dwelling, then that fact either in isolation or in combin[ation] with other aggravating factors will make the crime a higher grade than it would otherwise be." 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.1(c) (2d ed. 2003) (LaFave 2003); see LaFave § 8.13(c) ("There is no jurisdiction which retains the common-law requirement that the offense take place against a dwelling house or building within its curtilage for all degrees of the offense, though some require that the offense be against a dwelling house for a higher grade of the offense."). Treating that fact as an aggravator recognizes that home invasions are especially dangerous because "[a] person would likely be present where the person is living." *Herrold*, 883 F.3d at 550 (Haynes, J., dissenting).

As the legislatures of Tennessee, Arkansas, and many other States have recognized, the inherent danger of a home invasion is present "irrespective of whether" the burglar invades "a traditional home or a 'vehicle adapted for overnight accommodation.'" *Herrold*, 883 F.3d at 550 (Haynes, J., dissenting). And excluding the invasion of such homes from ACCA burglary would produce "head-scratching" results. *Stitt* Pet. App. 50a (Sutton, J., dissenting). As Judge Sutton pointed out, on the courts of appeals' view, an aggravated home-invasion burglary crime would not count as ACCA burglary if it included mobile homes, while a lesser grade of building burglary that included, for example, "tool sheds," would. *Ibid.*; see *Herrold*, 883 F.3d at 550 (Haynes, J., dissenting) (similar). Congress could not have intended such a counterintuitive result, and it is inconsistent with *Taylor*'s construction of ACCA burglary to include *both* "aggravated" *and* "run-of-the-mill" burglaries, 495 U.S. at 597.

B. The Decisions Below Misconstrued The ACCA And This Court's Decisions

The Tennessee and Arkansas statutes at issue here criminalize just the sort of home invasions that lie at the "heart of the crime" of burglary, *Stitt* Pet. App. 51a (Sutton, J., dissenting), as defined in *Taylor*. The courts below erred in reading this Court's decisions to require a crabbed construction of ACCA burglary that both devalues the invasions of particular homes and is consistent with, at most, the outlier views of seven States (some of which still adhered to the outdated common-law definition) at the time the relevant language was enacted. See *Smith*, 877 F.3d at 724 ("[I]t [is] unlikely that the Justices set out in *Taylor* to adopt a definition of generic burglary that is satisfied by no more than a

handful of states—if by any."); *Herrold*, 883 F.3d at 550 (Haynes, J., dissenting) ("To say a traditional home is protected by ACCA enhancements whereas a mobile home is not simply does not comport with Congress's intent and *Taylor*'s reasoning.").

1. The statutes underlying respondents' prior convictions prohibit burglary within "the generic sense in which the term [was] used in the criminal codes of most States," *Taylor*, 495 U.S. at 598.

The Tennessee aggravated-burglary statute criminalizes burglary of a "habitation," Tenn. Code. Ann. § 39-14-403(a) (1997), defined as a "structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons" or a "self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant," *id.* § 39-14-401(1)(A)-(B) (Supp. 2001); see *id.* § 39-14-401(1)(C). The Arkansas aggravated-burglary statute criminalizes burglary of a "residential occupiable structure," Ark. Code Ann. § 5-39-201(a)(1) (2013), defined as "a vehicle, building or other structure: (i) In which any person lives; or (ii) That is customarily used for overnight accommodation of a person whether or not a person is actually present," *id.* § 5-39-101(4)(A). For all the reasons discussed above, such residential-burglary crimes qualify as generic burglary under the ACCA.

The Tennessee and Arkansas laws are classic prohibitions against home invasions. They criminalize serious and dangerous conduct that nearly every State in 1986, and nearly every State now, would recognize as burglary. Neither *Taylor* nor any other decision of this

Court provides a basis for nonetheless deeming convictions under those statutes not to be convictions for "burglary" under the ACCA.

2. The courts below did not dispute that *Taylor*'s definition of burglary was meant to reflect the "generic sense" in which "most States" defined the term, 495 U.S. at 598. But they focused instead on *Taylor*'s statement that "[a] few States' burglary statutes * * * define[d] burglary more broadly, *e.g.*, by * * * including places, such as automobiles and vending machines, other than buildings," *id.* at 599. They read that statement, in combination with statements in other cases involving burglary statutes covering vehicles, to compel the conclusion that *Taylor* and its progeny exclude from generic burglary *all* statutes reaching *any* type of vehicle. See *Stitt* Pet. App. 5a-7a; *Sims* Pet. App. 4a-5a. That reading is unsound.

As a threshold matter, the courts of appeals' view disregards the empirical grounding and legal backdrop of *Taylor*. As previously discussed, the Court's reference to the "generic sense in which the term [burglary] is now used in the criminal codes of most States," 495 U.S. at 598, would have encompassed invasions of mobile or nonpermanent dwellings. The Court's mention of "[a] *few* States' burglary statutes" that were overbroad as to location, *id.* at 599 (emphasis added), provides no support for an interpretation of ACCA burglary that would exclude the burglary statutes of the *vast majority* of jurisdictions.

Furthermore, as Judge Sutton pointed out (*Stitt* Pet. App. 48a), the lower courts' interpretation makes "the mistake of reading an opinion (in truth part of an opinion) like a statute." See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979) ("[T]he language of an opinion

is not always to be parsed as though we were dealing with language of a statute."). When this Court has stated that generic burglary cannot be committed in an automobile or vessel, it has had before it burglary statutes that covered *all* such locations. The courts below nevertheless assumed that when this Court discussed "automobiles" or "vessels," it meant to exclude from generic burglary all statutes addressing any such vehicles, no matter the limits of the particular state provision. That assumption was mistaken.

Since its inception, this Court has consistently instructed that its general statements must be considered in the context in which they were made. See, *e.g.*, *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821) (Marshall, C.J.) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.") (quoted in *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006)). None of the statements on which the courts below relied, however, arose in a context in which the Court was considering a burglary statute that covered vehicles only to the extent that they are inhabited or habitable. Cf. *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989) ("[T]he Court did not address the meaning of person in any of those cases, and in none of the cases was resolution of that issue necessary to the decision.").

The *Stitt* majority observed that *Taylor* "offer[ed]" the California and Texas burglary prohibitions—"both of which criminalize the unauthorized entry of vehicles—as examples of overly broad burglary definitions." *Stitt*

Pet. App. 6a (citing 495 U.S. at 591). But at the time of *Taylor*, both California and Texas burglary "covered all vehicles, and so [their provisions] were clearly not generic under *Taylor*." *Id.* at 49a (Sutton, J., dissenting) (emphasis omitted).[2] Similarly, *Taylor* noted that "[o]ne of Missouri's second-degree burglary statutes in effect at the times of petitioner Taylor's convictions," which "included breaking and entering 'any booth or tent, or any boat or vessel, or railroad car,'" encompassed some nongeneric forms of burglary. 495 U.S. at 599 (quoting Mo. Rev. Stat. § 560.070 (1969) (repealed)); see *id.* at 606. But *Taylor* had no occasion to consider whether a more finely tuned burglary statute, limited to mobile dwellings like motor homes and houseboats, satisfied its generic definition.

The reliance of the courts below on statements in subsequent decisions of this Court to the effect that generic burglary does not encompass unlawful entry into "vehicles," "automobiles," and "vessel[s]" is similarly misplaced. See *Stitt* Pet. App. 4a-5a, 6a-7a; *Sims*

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[2] Texas had adopted three burglary provisions, covering burglary of a habitation or building (Tex. Penal Code Ann. § 30.02 (West 1989)), burglary of coin-operated or coin collection machines (*id.* § 30.03), and burglary of vehicles (*id.* § 30.04). It appears that *Taylor*'s discussion referenced the vehicular-burglary provision. See 495 U.S. at 591 (citing *United States* v. *Leonard*, 868 F.2d 1393, 1395 n.2 (5th Cir. 1989), cert. denied, 496 U.S. 904 (1990)). Citing Texas's definitional provision, LaFave similarly listed Texas as an example of a jurisdiction that had extended its burglary statute to vehicles. See LaFave § 8.13(c) n.85 (citing Tex. Penal Code Ann. § 30.01 (West 1989)). Subsequent editions of the treatise suggest that LaFave intended to highlight the specific provision (Tex. Penal Code Ann. § 30.04 (West 1989)) addressing "[b]urglary of [v]ehicles," because they refer to a case applying that provision. See LaFave 2003 § 21.1(c) n.91 (citing *Richardson* v. *State*, 888 S.W.2d 822 (Tex. Crim. App. 1994) (en banc)).

Pet. App. 4a-5a. None of those cases involved a statute limiting its coverage of vehicles, automobiles, or vessels to those adapted or used for overnight accommodation. See *Mathis* v. *United States*, 136 S. Ct. 2243, 2250 (2016) (statute covering "any building, structure, [or] land, water, or air vehicle") (citation and emphasis omitted; brackets in original); *Nijhawan* v. *Holder*, 557 U.S. 29, 35 (2009) (statute covering a "building, ship, vessel or vehicle") (citation omitted); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186-187 (2007) (noting *Shepard*'s consideration of a statute covering breaking into both a "building" and a "vehicle") (citation omitted); *Shepard* v. *United States*, 544 U.S. 13, 15-16 (2006) (considering statute that reached both buildings and vehicles, and stating that "[t]he [ACCA] makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle").[3] They accordingly do not support the rule that the courts below adopted here.

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[3] In his brief in opposition, respondent Sims emphasized (at 6-7) this Court's recent decision in *Mathis*. There, the Court agreed with the parties that an Iowa burglary statute that proscribed unlawful entry into "any * * * land, water or air vehicle * * * adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value," Iowa Code Ann. § 702.12 (West 2013), "reaches a broader range of places" than generic burglary. *Mathis*, 136 S. Ct. at 2250; see *Herrold*, 883 F.3d at 537-538 (relying on *Mathis*). But because "the Iowa statute * * * included vehicles used for storage," the understanding that it was broader than generic burglary does not establish that a burglary statute tailored to mobile habitations, like Tennessee's or Arkansas's, is non-generic. *Herrold*, 883 F.3d at 551 (Haynes, J., dissenting).

3. The majority in *Stitt* also supported its distinction between different types of homes by reading into *Taylor*'s definition of burglary an "emphasi[s]" on "a place's form and nature—not its intended use or purpose." *Stitt* Pet. App. 5a. That formalistic dichotomy, however, has no foundation in *Taylor*'s use of the phrase "building or other structure." *Ibid.* (citation omitted).

A structure used or adapted as a home will necessarily differ from one that is not in both function *and* form. A place's "form and nature," *Stitt* Pet. App. 5a, will always reflect its "intended use or purpose," *ibid.*, to at least some degree. As Judge Sutton observed, "form follows function, making it impossible for any definition of burglary to avoid functional considerations." *Id.* at 50a (Sutton, J., dissenting) (emphasis omitted). A houseboat, for example, is different, in both form and function, from a speedboat. And a terrestrial mobile home is likewise different from other types of vehicles. See *Grisel*, 488 F.3d at 855 n.2 (Bea, J., dissenting) ("The analysis quite properly focuses on both the *nature* and *use* of the structure because there is no difference between the two. The nature of a home or an RV is to provide shelter to persons; the use of a home or an RV is to provide shelter to persons.").

The differences in form that are coextensive with a structure's adaptation or use as a dwelling, moreover, are directly related to the danger that a burglary of that structure would present. For example, the structure will almost invariably have some sort of sleeping area, in which a person may be at rest when the burglar enters. Indeed, by disregarding the inseparability of form and function, the approach of the decisions below reaches the incongruous result of treating burglary of a

"gazebo[]," *Stitt* Pet. App. 50a (Sutton, J., dissenting), but not burglary of a trailer home, as a violent felony.

4. The *Stitt* majority also relied on the definition of burglary in the pre-amendment 1984 version of the ACCA, which included the word "building" but not the word "structure." *Stitt* Pet. App. 9a. But whatever weight the Court might have attached to that terminological choice, had it been called upon to interpret that since-deleted language directly, *Taylor* did not treat it as a limitation on the scope of generic burglary under the current version of the ACCA. Although *Taylor* described its definition of generic burglary as "practically identical to the 1984 definition," 495 U.S. at 598, the deletion of which it viewed as potentially inadvertent, see *id.* at 589-590 & n.5, it explicitly adopted a definition that reached "building[s] *or other structure[s]*," *id.* at 598 (emphasis added). See *Shepard*, 544 U.S. at 16 (describing generic burglary as unlawful entry into a "building *or enclosed space*") (emphasis added).

The Court did so based on a determination that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States," *Taylor*, 495 U.S. at 598; the understanding that contemporary state statutes "typically describe[d] the place [that is burglarized] as a 'building' or 'structure,'" *ibid.* (quoting LaFave § 8.13(c)); and reliance on both a treatise recognizing the typical breadth of those terms and a Model Penal Code definition that used similar terms to encompass burglary of a mobile or nonpermanent dwelling, see *id.* at 598 & n.8; pp. 18-24, *supra*. The courts below erred in nevertheless excising such crimes from the scope of ACCA burglary, leaving behind a highly stylized definition that covers almost no state crimes.

CONCLUSION

The judgments of the court of appeals should be reversed and the cases remanded for further proceedings.

Respectfully submitted.

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APPENDIX A

1. 18 U.S.C. 924 provides:

Penalties

(a)(1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

(B) knowingly violates subsection (a)(4), (f), (k), or (q) of section 922;

(C) knowingly imports or brings into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*); or

(D) willfully violates any other provision of this chapter,

shall be fined under this title, imprisoned not more than five years, or both.

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (*o*) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

(3) Any licensed dealer, licensed importer, licensed manufacturer, or licensed collector who knowingly—

(A) makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or

(B) violates subsection (m) of section 922,

shall be fined under this title, imprisoned not more than one year, or both.

(4) Whoever violates section 922(q) shall be fined under this title, imprisoned for not more than 5 years, or both. Notwithstanding any other provision of law, the term of imprisonment imposed under this paragraph shall not run concurrently with any other term of imprisonment imposed under any other provision of law. Except for the authorization of a term of imprisonment of not more than 5 years made in this paragraph, for the purpose of any other law a violation of section 922(q) shall be deemed to be a misdemeanor.

(5) Whoever knowingly violates subsection (s) or (t) of section 922 shall be fined under this title, imprisoned for not more than 1 year, or both.

(6)(A)(i) A juvenile who violates section 922(x) shall be fined under this title, imprisoned not more than 1 year, or both, except that a juvenile described in clause (ii) shall be sentenced to probation on appropriate conditions and shall not be incarcerated unless the juvenile fails to comply with a condition of probation.

(ii) A juvenile is described in this clause if—

(I) the offense of which the juvenile is charged is possession of a handgun or ammunition in violation of section 922(x)(2); and

(II) the juvenile has not been convicted in any court of an offense (including an offense under section 922(x) or a similar State law, but not including any other offense consisting of conduct that if engaged in by an adult would not constitute an offense) or adjudicated as a juvenile delinquent for conduct that if engaged in by an adult would constitute an offense.

(B) A person other than a juvenile who knowingly violates section 922(x)—

(i) shall be fined under this title, imprisoned not more than 1 year, or both; and

(ii) if the person sold, delivered, or otherwise transferred a handgun or ammunition to a juvenile knowing or having reasonable cause to know that the juvenile intended to carry or otherwise possess or discharge or otherwise use the handgun or ammunition in the commission of a crime of violence, shall be fined under this title, imprisoned not more than 10 years, or both.

(7) Whoever knowingly violates section 931 shall be fined under this title, imprisoned not more than 3 years, or both.

(b) Whoever, with intent to commit therewith an offense punishable by imprisonment for a term exceeding one year, or with knowledge or reasonable cause to believe that an offense punishable by imprisonment for a term exceeding one year is to be committed therewith, ships, transports, or receives a firearm or any ammunition in interstate or foreign commerce shall be fined under this title, or imprisoned not more than ten years, or both.

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and—

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition—

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

(d)(1) Any firearm or ammunition involved in or used in any knowing violation of subsection (a)(4), (a)(6), (f), (g), (h), (i), (j), or (k) of section 922, or knowing importation or bringing into the United States or any possession thereof any firearm or ammunition in violation of section 922(*l*), or knowing violation of section 924, or willful violation of any other provision of this chapter or any rule or regulation promulgated thereunder, or any violation of any other criminal law of the United States, or any firearm or ammunition intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter: *Provided*, That upon acquittal of the owner or possessor, or dismissal of the charges against him other than upon motion of the Government prior to trial, or lapse of or court termination of the restraining order to which he is subject, the seized or relinquished firearms or ammunition shall be returned forthwith to the owner or possessor or to a person delegated by the owner or possessor unless the return of the firearms or ammunition would place the owner or possessor or his delegate in violation of law. Any action or proceeding for the forfeiture of firearms or ammunition shall be commenced within one hundred and twenty days of such seizure.

(2)(A) In any action or proceeding for the return of firearms or ammunition seized under the provisions of this chapter, the court shall allow the prevailing party,

other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(B) In any other action or proceeding under the provisions of this chapter, the court, when it finds that such action was without foundation, or was initiated vexatiously, frivolously, or in bad faith, shall allow the prevailing party, other than the United States, a reasonable attorney's fee, and the United States shall be liable therefor.

(C) Only those firearms or quantities of ammunition particularly named and individually identified as involved in or used in any violation of the provisions of this chapter or any rule or regulation issued thereunder, or any other criminal law of the United States or as intended to be used in any offense referred to in paragraph (3) of this subsection, where such intent is demonstrated by clear and convincing evidence, shall be subject to seizure, forfeiture, and disposition.

(D) The United States shall be liable for attorneys' fees under this paragraph only to the extent provided in advance by appropriation Acts.

(3) The offenses referred to in paragraphs (1) and (2)(C) of this subsection are—

(A) any crime of violence, as that term is defined in section 924(c)(3) of this title;

(B) any offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.) or the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.);

(C) any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title, where the firearm or ammunition intended to be used in any such offense is involved in a pattern of activities which includes a violation of any offense described in section 922(a)(1), 922(a)(3), 922(a)(5), or 922(b)(3) of this title;

(D) any offense described in section 922(d) of this title where the firearm or ammunition is intended to be used in such offense by the transferor of such firearm or ammunition;

(E) any offense described in section 922(i), 922(j), 922(*l*), 922(n), or 924(b) of this title; and

(F) any offense which may be prosecuted in a court of the United States which involves the exportation of firearms or ammunition.

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951

et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(f) In the case of a person who knowingly violates section 922(p), such person shall be fined under this title, or imprisoned not more than 5 years, or both.

(g) Whoever, with the intent to engage in conduct which—

(1) constitutes an offense listed in section 1961(1),

(2) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46,

(3) violates any State law relating to any controlled substance (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(h) Whoever knowingly transfers a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3)) or drug trafficking crime (as defined in subsection (c)(2)) shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

(i)(1) A person who knowingly violates section 922(u) shall be fined under this title, imprisoned not more than 10 years, or both.

(2) Nothing contained in this subsection shall be construed as indicating an intent on the part of Congress to occupy the field in which provisions of this subsection operate to the exclusion of State laws on the

same subject matter, nor shall any provision of this subsection be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this subsection.

(j) A person who, in the course of a violation of subsection (c), causes the death of a person through the use of a firearm, shall—

(1) if the killing is a murder (as defined in section 1111), be punished by death or by imprisonment for any term of years or for life; and

(2) if the killing is manslaughter (as defined in section 1112), be punished as provided in that section.

(k) A person who, with intent to engage in or to promote conduct that—

(1) is punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

(*l*) A person who steals any firearm which is moving as, or is a part of, or which has moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(m) A person who steals any firearm from a licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall be fined under this title, imprisoned not more than 10 years, or both.

(n) A person who, with the intent to engage in conduct that constitutes a violation of section 922(a)(1)(A), travels from any State or foreign country into any other State and acquires, or attempts to acquire, a firearm in such other State in furtherance of such purpose shall be imprisoned for not more than 10 years.

(*o*) A person who conspires to commit an offense under subsection (c) shall be imprisoned for not more than 20 years, fined under this title, or both; and if the firearm is a machinegun or destructive device, or is equipped with a firearm silencer or muffler, shall be imprisoned for any term of years or life.

(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

(1) IN GENERAL.—

(A) SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

(ii) subject the licensee to a civil penalty in an amount equal to not more than $2,500.

(B) REVIEW.—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

(2) ADMINISTRATIVE REMEDIES.—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.

2. Tenn. Code Ann. § 39-14-401 (Supp. 2001) provides:

Definitions for burglary and related offenses.—As used in this part, unless the context otherwise requires:

(1) "Habitation":

(A) Means any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons;

(B) Includes a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant; and

(C) Includes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle;

(2) "Occupied" means the condition of the lawful physical presence of any person at any time while the defendant is within the habitation or other building; and

(3) "Owner" means a person in lawful possession of property, whether the possession is actual or constructive. "Owner" does not include a person, who is restrained from the property or habitation by a valid court order or order of protection, other than an ex parte order of protection, obtained by the person maintaining residence on the property.

3. Tenn. Code Ann. § 39-14-402 (1997) provides:

Burglary.—(a) A person commits burglary who, without the effective consent of the property owner:

(1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;

(2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;

(3) Enters a building and commits or attempts to commit a felony, theft or assault; or

(4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a felony, theft or assault.

(b) As used in this section, "enter" means:

(1) Intrusion of any part of the body; or

(2) Intrusion of any object in physical contact with the body or any object controlled by remote control, electronic or otherwise.

(c) Burglary under subdivision (a)(1), (2) or (3) is a Class D felony.

(d) Burglary under subdivision (a)(4) is a Class E felony.

4. Tenn. Code Ann. § 39-14-403 (1997) provides:

Aggravated burglary.—(a) Aggravated burglary is burglary of a habitation as defined in §§ 39-14-401 and 39-14-402.

(b) Aggravated burglary is a Class C felony.

5. Ark. Code Ann. § 5-39-101 (Michie 1997) provides:

Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Residential occupiable structure" means a vehicle, building, or other structure:

(A) Where any person lives; or

(B) Which is customarily used for overnight accommodation of persons whether or not a person is actually present. Each unit of a residential occupiable structure divided into separately occupied units is itself a residential occupiable structure.

(2) "Commercial occupiable structure" means a vehicle, building, or other structure:

(A) Where any person carries on a business or other calling; or

(B) Where people assemble for purposes of business, government, education, religion, entertainment, or public transportation.

(3) "Premises" means occupiable structures and any real property.

(4) "Enter or remain unlawfully" means to enter or remain in or upon premises when not licensed or privileged to do so. A person who enters or remains in or upon premises that are at the time open to the public does so with license and privilege, regardless of his purpose, unless he defies a lawful order not to enter or remain personally communicated to him by the owner of the premises or some other person authorized by the owner. A license or privilege to enter or remain in or upon premises only part of which are open to the public is not a license or privilege to enter or remain in a part of the premises not open to the public. A person who enters or remains upon unimproved and apparently unused land not fenced or otherwise enclosed in a manner designed to exclude intruders does so with license and privilege unless notice not to enter or remain is personally communicated to him by the owner or some person authorized by the owner, or unless notice is given by posting in a conspicuous manner.

(5) "Vehicle" means any craft or device designed for the transportation of people or property across land or water or through the air.

6. Ark. Code Ann. § 5-39-101 (2013) provides:

Definitions.

As used in this chapter:

(1) "Commercial occupiable structure" means a vehicle, building, or other structure in which:

(A) Any person carries on a business or other calling; or

(B) People assemble for a purpose of business, government, education, religion, entertainment, or public transportation;

(2)(A) "Enter or remain unlawfully" means to enter or remain in or upon premises when not licensed or privileged to enter or remain in or upon the premises.

(B)(i) A person who enters or remains in or upon premises that are at the time open to the public does so with license and privilege, regardless of his or her purpose, unless he or she defies a lawful order not to enter or remain on the premises personally communicated to the person by the owner of the premises or another person authorized by the owner.

(ii) A license or privilege to enter or remain in or upon premises only part of which are open to the public is not a license or privilege to enter or remain in a part of the premises not open to the public.

(C) A person who enters or remains upon unimproved and apparently unused land not fenced or otherwise enclosed in a manner designed to exclude an intruder does so with license and privilege unless:

(i) Notice not to enter or remain is personally communicated to the person by the owner or a person authorized by the owner; or

(ii) Notice is given by posting in a conspicuous manner;

(3) "Premises" means an occupiable structure and any real property;

(4)(A) "Residential occupiable structure" means a vehicle, building, or other structure:

(i) In which any person lives; or

(ii) That is customarily used for overnight accommodation of a person whether or not a person is actually present.

(B) "Residential occupiable structure" includes each unit of a residential occupiable structure divided into a separately occupied unit; and

(5) "Vehicle" means any craft or device designed for the transportation of a person or property across land or water or through the air.

7. Ark. Code Ann. § 5-39-201 (Michie 1997) provides:

Residential burglary—Commercial burglary.

(a)(1) A person commits residential burglary if he enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing therein any offense punishable by imprisonment.

(2) Residential burglary is a Class B felony.

(b)(1) A person commits commercial burglary if he enters or remains unlawfully in a commercial occupiable structure of another with the purpose of committing therein any offense punishable by imprisonment.

(2) Commercial burglary is a Class C felony.

8. Ark. Code Ann. § 5-39-201 (2013) provides:

Residential burglary—Commercial burglary.

(a)(1) A person commits residential burglary if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment.

(2) Residential burglary is a Class B felony.

(b)(1) A person commits commercial burglary if he or she enters or remains unlawfully in a commercial occupiable structure of another person with the purpose of committing in the commercial occupiable structure any offense punishable by imprisonment.

(2) Commercial burglary is a Class C felony.

APPENDIX B

State Burglary Statutes at the Time of 18 U.S.C. 924(e)(2)(B)(ii)'s Enactment (Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39)

* Statutes encompassing nonpermanent or mobile structures irrespective of their purpose

† Statutes encompassing nonpermanent or mobile structures used for enumerated purposes

‡ Statutes adhering to the common-law definition of burglary

§ Statutes broader than the common-law definition that exclude or do not specifically address nonpermanent or mobile structures

Alabama†	Ala. Code §§ 13A-7-5, 13A-7-6, 13A-7-7 (1982) (defining burglary as involving a "dwelling" or "building"); *id.* § 13A-7-1(2) (Supp. 1983) (defining building as "[a]ny structure which may be entered and utilized by persons for business, public use, lodging or the storage of goods, * * * includ[ing] any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein").

Alaska†	Alaska Stat. §§ 11.46.300, 11.46.310 (1983) (defining burglary as involving a "building"); *id.* § 11.81.900 (Supp. 1985) (defining building to include, "in addition to its usual meaning, * * * any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business").
Arizona†	Ariz. Rev. Stat. Ann. § 13-1506 (Supp. 1981) (defining third-degree burglary as involving "a nonresidential structure"); *id.* § 13-507 (defining second-degree burglary as involving "a residential structure"); *id.* § 13-501(7) (1978) (defining "[r]esidential structure" as "any structure, movable or immovable, permanent or temporary, adapted for both human residence and lodging whether occupied or not"); *id.* § 13-1501(8) (defining "[s]tructure" as "any building, object, vehicle, railroad car or place with sides and a floor, separately securable from any other structure attached to it and used for lodging, business, transportation, recreation or storage").

Arkansas†	Ark. Stat. Ann. §§ 41-2001, 41-2002 (1977) (defining burglary as involving an "occupiable structure," *i.e.*, "a vehicle, building, or other structure: (a) where any person lives or carries on a business or other calling; * * * (b) where people assemble for purpose of business, government, education, religion, entertainment, or public transportation; or (c) which is customarily used for overnight accommodation of persons").
California*	Cal. Penal Code § 459 (Deering 1985) (defining burglary as involving "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse[,] or other building, tent, vessel, railroad car, locked or sealed cargo container * * * , trailer coach * * * , any house car * * * , inhabited camper * * * , vehicle * * * when the doors of such vehicle are locked, aircraft * * * , [or] mine").
Colorado†	Colo. Rev. Stat. §§ 18-4-101, 18-4-202, 18-4-203 (1986) (defining first- and second-degree burglary as involving a "building or

	occupied structure," *i.e.*, "a structure which has the capacity to contain, and is designed for the shelter of, man, animals, or property, * * * includ[ing] a ship, trailer, sleeping car, airplane, or other vehicle or place adapted for overnight accommodations of persons or animals, or for carrying on of business therein" (building) or "any area, place, facility, or enclosure which * * * is in fact occupied by a person or animal, and known by the defendant to be thus occupied" (occupied structure)).
Connecticut*	Conn. Gen. Stat. Ann. § 53a-103 (West 1972) (defining burglary as involving a "building"); *id.* § 53a-100(a)(1) (West Supp. 1985) (defining building to include, "in addition to its ordinary meaning, * * * any watercraft, aircraft, trailer, sleeping car, railroad car, other structure or vehicle").
Delaware*	Del. Code Ann. tit. 11, §§ 221(1), 824-825 (1979) (defining burglary as involving, *inter alia*, a "building," defined to include, "in addition to its ordinary meaning, * * * any structure, vehicle or watercraft").

District of Columbia*	D.C. Code Ann. § 22-1801(b) (1973) (defining burglary as involving "any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, * * * any steamboat, canalboat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade").
Florida*	Fla. Stat. chs. 810.011, 810.02(1) (1985) (defining burglary as involving "a structure or a conveyance," *i.e.*, "a building of any kind, either temporary or permanent, which has a roof over it" (structure) or "any motor vehicle, ship, vessel, railroad car, trailer, aircraft, or sleeping car" (conveyance)).
Georgia†	Ga. Code Ann. § 16-7-1 (Michie 1984) (defining burglary as involving "the dwelling house of another or any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another").
Hawaii†	Haw. Rev. Stat. §§ 708-800, 708-810, 708-811 (1985) (defining

	burglary as involving a "building," *i.e.*, "any structure, [or] * * * any vehicle, railway car, aircraft, or watercraft used for lodging of persons therein").
Idaho*	Idaho Code § 18-1401 (Supp. 1981) (defining burglary as involving a "house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, closed vehicle, closed trailer, airplane or railroad car").
Illinois*	Ill. Rev. Stat. ch. 38, paras. 2-6, 19-1(a), 19-3(a) (1983) (defining burglary as involving a "building, housetrailer, watercraft, aircraft, motor vehicle[,] * * * [or] railroad car," and defining residential burglary as involving a "dwelling," *i.e.*, "a building or portion thereof, a tent, a vehicle, or other enclosed space which is used or intended for use as a human habitation").
Indiana[§]	Ind. Code Ann. § 35-43-2-1 (Burns Supp. 1984) (defining burglary as involving a "building or structure" without further defining those terms); see also *McCormick* v. *State*, 382 N.E.2d 172, 174-176 & nn.1-2 (Ind. Ct. App.

	1978) (noting that, until 1976, Indiana separately criminalized burglary of any boat, railroad car, automobile, or building other than a dwelling).
Iowa†	Iowa Code §§ 702.12, 713.1-713.6 (1985) (defining burglary as involving an "occupied structure," *i.e.*, "any building, structure, * * * land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value," but not an "object or device * * * too small or not designed to allow a person to physically enter or occupy it").
Kansas*	Kan. Stat. Ann. § 21-3715 (Supp. 1974) (defining burglary to involve a "building, mobile home, tent or other structure, or any motor vehicle, aircraft, watercraft, railroad car or other means of conveyance of persons or property").
Kentucky†	Ky. Rev. Stat. Ann. §§ 511.010, 511.020, 511.030 (Michie 1985) (defining burglary as involving a

	"building" or "dwelling," defined to include, "in addition to its ordinary meaning, * * * any structure, vehicle, watercraft or aircraft (a) [w]here any person lives; or (b) [w]here people assemble for purposes of business, government, education, religion, entertainment or public transportation" (building) or "a building which is usually occupied by a person lodging therein" (dwelling)).
Louisiana*	La. Rev. Stat. Ann. § 14:62 (West 1986) (defining burglary as involving "any dwelling, vehicle, watercraft, or other structure, movable or immovable").
Maine†	Me. Rev. Stat. Ann. tit. 17-A, § 401 (West 1983 & Supp. 1986) (defining burglary as involving a "structure"); *id.* § 2(24) (West 1983) (defining structure as "a building or other place designed to provide protection for persons or property against weather or intrusion, but * * * not includ[ing] vehicles and other conveyances whose primary purpose is transportation of persons or property unless such vehicle or conveyance, or a section thereof, is also a dwelling place").

Maryland[†]	See *Sizemore* v. *State*, 272 A.2d 824, 825-826 (Md. Ct. Spec. App.) (citing Md. Ann. Code art. 27, §§ 29-30, 32-33 (1967), and noting that Maryland "recognizes six separate and distinct crimes related to the breaking of structures," including common-law burglary, daytime housebreaking, and "storehouse breaking," which "cover[s] all buildings other than dwelling houses" but is "not burglary at all"), cert. denied, 261 Md. 728 (1971).
Massachusetts[*]	Mass. Gen. L. ch. 266, § 15 (1986) (defining burglary as involving "a dwelling house"); see *id.* §§ 16, 19, 20A (separately prohibiting the "break[ing] and ent[ry]" into any "building, ship, vessel or vehicle," railroad cars, or any "truck, tractor/trailer unit, trailer, semi-trailer or freight container").
Michigan[*]	Mich. Comp. Laws Ann. § 750.110 (West 1968) (defining breaking and entering to involve an "occupied dwelling," as well as a "tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat or ship, railroad car or

	* * * any unoccupied dwelling house").
Minnesota†	Minn. Stat. §§ 609.581, 609.582 (1986) (defining burglary as involving a "building," defined as "a structure suitable for affording shelter for human beings including any appurtenant or connected structure"); see *State* v. *Vredenberg*, 264 N.W.2d 406, 407 (Minn. 1978) (per curiam) (houseboats' cabins constituted "buildings" under prior version of burglary statute "because they are, in fact, suitable for human shelter").
Mississippi‡	Miss. Code Ann. § 97-17-19 (1973) (defining burglary as involving "any dwelling house").
Missouri†	Mo. Rev. Stat. §§ 569.010, 569.170 (1986) (defining burglary as involving a "building" or "inhabitable structure," *i.e.*, "a ship, trailer, sleeping car, airplane, or other vehicle or structure: (a) Where any person lives or carries on business or other calling; or (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or (c) Which is used

	for overnight accommodation of persons").
Montana†	Mont. Code Ann. §§ 45-2-101(40), 45-6-204 (1985) (defining burglary as involving an "occupied structure," *i.e.*, a "building, vehicle, or other place suitable for human occupancy or night lodging of persons or for carrying on business").
Nebraska§	Neb. Rev. Stat. § 28-507 (1985) (defining burglary as involving "real estate or any improvements erected thereon").
Nevada*	Nev. Rev. Stat. Ann. § 205.060 (Michie 1986) (defining burglary as involving "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, vehicle, vehicle trailer, semitrailer or house-trailer, airplane, glider, boat or railroad car").
New Hampshire†	N.H. Rev. Stat. Ann. § 635:1 (1986) (defining burglary as involving a "building or occupied structure," *i.e.*, "any structure, vehicle, boat or place adapted for

	overnight accommodation of persons, or for carrying on business").
New Jersey*	N.J. Stat. Ann. §§ 2C:18-1, 2C:18-2 (West 1982) (defining burglary as involving a "structure," *i.e.*, "any building, room, ship, vessel, car, vehicle or airplane, and also * * * any place adapted for overnight accommodation of persons, or for carrying on business therein").
New Mexico*	N.M. Stat. Ann. § 30-16-3 (Michie 1978) (defining burglary as involving "any vehicle, watercraft, aircraft, dwelling or other structure, movable or immovable").
New York†	N.Y. Penal Law § 140.20 (McKinney 1975) (defining burglary as involving a "building"); *id.* § 140.00(2) (McKinney Supp. 1986) (defining building to include, "in addition to its ordinary meaning, * * * any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school, or an inclosed motor truck, or an inclosed motor truck trailer").

North Carolina†	*State* v. *Oakman*, 388 S.E.2d 579, 581 (N.C. Ct. App. 1990) ("North Carolina retains the common law definition of burglary.").
North Dakota†	N.D. Cent. Code §§ 12.1-22-02, 12.1-22-06 (1985) (defining burglary as involving a "building" or "occupied structure," *i.e.*, "a structure or vehicle: a. Where any person lives or carries on business or other calling; or b. Which is used for overnight accommodation of persons").
Ohio†	Ohio Rev. Code Ann. § 2911.12 (Anderson Supp. 1985) (defining burglary as involving an "occupied structure)"; *id.* § 2909.01 (Anderson 1982) (defining occupied structure as "any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, * * * (A) Which is maintained as a permanent or temporary dwelling * * * ; (B) Which at the time is occupied as the permanent or temporary habitation of any person * * * ; (C) Which at the time is specially adapted for the overnight accommodation of any person * * * ;

	[or] (D) In which at the time any person is present or likely to be present").
Oklahoma*	Okla. Stat. Ann. tit. 21, § 1435 (West Supp. 1982) (defining burglary as involving "any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection, in which any property is kept").
Oregon†	Or. Rev. Stat. §§ 164.205(1), 164.215(1) (1983) (defining burglary as involving a "building," defined to include, "in addition to its ordinary meaning, * * * any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein").
Pennsylvania†	18 Pa. Cons. Stat. Ann. §§ 3501, 3502 (1973) (defining burglary as involving a "building" or "occupied structure," *i.e.*, "[a]ny structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein").

Rhode Island[‡]	R.I. Gen. Laws § 11-8-1 (1981) (common-law definition of burglary).
South Carolina[†]	S.C. Code Ann. §§ 16-11-310(1), 16-11-313 (Law. Co-op. Supp. 1985) (defining burglary as involving a "building," *i.e.*, "any structure, vehicle, watercraft, or aircraft: (a) Where any person lodges or lives; or (b) Where people assemble for purposes of business, government, education, religion, entertainment, public transportation, or public use or where goods are stored").
South Dakota[*]	S.D. Codified Laws §§ 22-32-1, 22-32-3, 22-32-8 (1979) (defining burglary as involving a "structure"); S.D. Codified Laws Ann. § 22-1-2(46) (Supp. 1986) (defining structure as "any house, building, outbuilding, motor vehicle, watercraft, aircraft, railroad car, truck, trailer, tent, or other edifice, vehicle or shelter, or any portion thereof").
Tennessee[*]	Tenn. Code Ann. §§ 39-3-401, 39-3-403, 39-3-404, 39-3-406 (1982) (defining burglary as involving "a dwelling house, or any other house, building, room or rooms

	therein used and occupied by any person or persons as a dwelling place or lodging either permanently or temporarily" (general burglary and second-degree burglary); "a business house, outhouse, or any other house of another, other than dwelling house" (third-degree burglary); or "any freight or passenger car, automobile, truck, trailer or other motor vehicle" (breaking into vehicles)).
Texas†	Tex. Penal Code Ann. §§ 30.01, 30.02 (West 1974) (defining burglary as involving a "building" or "habitation," *i.e.*, "a structure or vehicle that is adapted for the overnight accommodation of persons").
Utah†	Utah Code Ann. §§ 76-6-201, 76-6-202 (1978) (defining burglary as involving a "building," defined to include, "in addition to its ordinary meaning, * * * any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business").
Vermont§	Vt. Stat. Ann. tit. 13, § 1201 (Supp. 1982) (defining burglary

	as involving a "building or structure" without further defining those terms beyond "their common meanings").
Virginia†	Va. Code Ann. § 18.2-90 (Michie Supp. 1986) (defining burglary as involving "any office, shop, storehouse, warehouse, banking house, or other house, or any ship, vessel or river craft or any railroad car, or any automobile, truck or trailer, if such automobile, truck or trailer is used as a dwelling or place of human habitation").
Washington†	Wash. Rev. Code. § 9A.52.020(1) (1985) (defining first-degree burglary as involving a "dwelling"); *id.* § 9A.04.110 (Supp. 1986) (defining dwelling as "any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging").
West Virginia†	W. Va. Code Ann. § 61-3-11 (Michie 1977) (defining burglary as involving a "dwelling house," which "shall include, but not be limited to, a mobile home, house trailer, modular home or self-propelled motor home, used as a dwelling regularly or only from

	time to time, or any other non-motive vehicle primarily designed for human habitation and occupancy and used as a dwelling regularly or only from time to time").
Wisconsin*	Wisc. Stat. Ann. § 943.10 (West 1982) (defining burglary as involving "[a]ny building or dwelling; * * * enclosed railroad car; * * * enclosed portion of any ship or vessel; * * * [or] motor home or other motorized type of home or a trailer home").
Wyoming*	Wyo. Stat. Ann. § 6-3-301 (Supp. 1986) (defining burglary as involving "a building, occupied structure or vehicle, or separately secured or occupied portion thereof").

No. 17-766

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

JASON DANIEL SIMS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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QUESTION PRESENTED

Whether a conviction for residential burglary under Ark. Code Ann. § 5-39-201(a)(1) falls within the generic crime of "burglary" for purposes of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(ii).

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BRIEF FOR RESPONDENT

Respondent Jason Daniel Sims respectfully requests that this Court affirm the judgment of the U.S. Court of Appeals for the Eighth Circuit.

INTRODUCTION

The Government fills its brief with talk about "mobile structures" and "mobile homes." But this case is actually about whether the locational element of generic burglary encompasses two distinct types of *vehicles*: (1) those, such as recreational vehicles ("RV's") and campers, that are designed for only occasional overnight use; and (2) automobiles not even designed for such use but in which a person nevertheless happens to live. Arkansas's residential burglary statute covers both of these types of motor vehicles, as well as their marine equivalents. This Court, however, has explained time and again that generic burglary excludes them.

STATEMENT OF THE CASE

A. Legal Background

1. A defendant convicted of being a felon in possession of a firearm is ordinarily subject to a maximum sentence of ten years' imprisonment. 18 U.S.C. §§ 922(g), 924(a)(2). But if the defendant "has three previous convictions . . . for a violent felony or a serious drug offense," 18 U.S.C. § 924(e)(1), "the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life," *Johnson v. United States*, 135 S. Ct. 2551, 2555 (2015). One of the offenses that the ACCA specifically enumerates as a "violent felony" is "burglary." 18 U.S.C. § 924(e)(2)(B)(ii).

In *Taylor v. United States*, 495 U.S. 575 (1990), this Court held that "burglary" for purposes of the ACCA is "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. The Court did not further define the phrase "building or structure. " But it did note specifically that certain state statutes that included "places, such as automobiles and vending machines, other than buildings," extended "more broadly." *Id.* The Court subsequently reiterated that the ACCA "makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), *not in a boat or motor vehicle.*" *Shepard v. United States*, 544 U.S. 13, 15-16 (2005) (emphasis added); *see also Mathis v. United States*, 136 S. Ct. 2243, 2250 (2016) (state law broader than generic burglary because it "reache[d] . . . land, water, or air vehicles" (emphasis omitted) (quoting Iowa Code § 702.12 (2013)).

2. To determine whether a particular prior state conviction qualifies as "burglary" under the ACCA, courts apply the "categorical approach." *Taylor*, 495 U.S. at 600. Under that approach, courts compare "the statutory definition" of the state crime of conviction to the "generic" form of burglary referenced in the ACCA. *Id.* at 602. If the definition of the state crime is the same as, or narrower than, "generic" burglary, then the prior offense qualifies as a predicate conviction under the ACCA. *Id.* But if the statute of conviction covers a broader range of conduct than the ACCA definition, the defendant's prior con-

viction does not (as relevant here) qualify as ACCA burglary.[1]

B. Factual and Procedural Background

1. Respondent Jason Daniel Sims pleaded guilty in the U.S. District Court for the Eastern District of Arkansas to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Pet. App. 1a. At sentencing, the Government argued that he should be sentenced under ACCA because he had four prior qualifying felony convictions. Respondent conceded he had two such convictions. But he contended his two prior convictions for Arkansas residential burglary did not constitute "burglary" under the ACCA.

Under Ark. Code Ann. § 5-39-201(a)(1), "[a] person commits residential burglary if he or she enters or remains unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment." *Id.* A "residential occupiable structure" is defined, in turn, as "a *vehicle*, building, or other structure: *(i) In which any person lives; or (ii) That is customarily used for overnight accommodation of a person whether or not a person is actually present.*" Ark. Code

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[1] Under what is known as the "modified categorical approach," the Government can attempt to show that a conviction for a state offense that is broader than its generic counterpart nevertheless constitutes a predicate conviction under the ACCA if the elements of the state crime are "divisible" and the jury necessarily found, or the defendant necessarily admitted, the elements of the generic offense. *See Descamps v. United States*, 570 U.S. 254, 263-64 (2013). The Government makes no such claim here. *See* Pet. App. 3a.

Ann. § 5-39-101(4)(A) (2013) (emphasis added).[2] And "vehicle" is defined as "any craft or device designed for the transportation of a person or property across land or water or through the air." *Id.* § 5-39-101(5).

"The district court disagreed with Sims and found his Arkansas residential burglary convictions were ACCA predicate offenses. As a result, Sims's advisory sentencing guidelines range was 188 to 235 months." Pet. App. 3a. The court sentenced him to 210 months (17 and one-half years) imprisonment, followed by three years of supervised release. *Id.*

2. The Eighth Circuit reversed. It observed that this Court has explained numerous times that the locational element of generic burglary does not extend to "boat[s] or motor vehicle[s]." Pet. App. 4a (quoting *Shepard*, 544 U.S. at 15-16) (emphasis removed). Yet under Arkansas law, a person commits residential burglary if he enters certain types of boats or motor vehicles with intent to commit a crime. *Id.* 3a (citing Ark. Code Ann. § 5-39-201(a)(1)). Accordingly, the court of appeals concluded that "Arkansas' residential burglary categorically sweeps more broadly than generic burglary" under the ACCA. *Id.* 6a.

The Eighth Circuit denied the Government's petition for rehearing en banc, and the case was remanded for resentencing. Pet. App. 7a-8a.

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[2] As the Government notes, respondent was convicted under a prior version of the statute, but the minor change in language does not affect the analysis here. *See* U.S. Br. 12 n.1.

SUMMARY OF ARGUMENT

The locational element of the Arkansas residential burglary statute is broader than its generic counterpart in the ACCA for two independent reasons: (i) it encompasses vehicles designed for only occasional overnight use; and (ii) it covers *any* vehicle in which a person happens to live.

1. In *Taylor v. United States*, 495 U.S. 575 (1990), and for nearly thirty years since, this Court has explained that the locational element of residential burglary covers "buildings" and "structures," but not "vehicles." *Id.* at 599; *see also Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016); *Shepard v. United States*, 544 U.S. 13, 15-16 (2005). The first prong of Arkansas's residential burglary statute, however, applies to "vehicles" that are "customarily used for overnight accommodation." Ark. Code Ann. § 5-39-101(4)(A)(ii). This subsection covers not only mobile homes but also RV's, campers, and boats with sleeping quarters. Regardless of whether the Government is correct that mobile homes can be regarded as "buildings" or "structures," the latter collection of objects certainly cannot.

Treating RV's, campers, and their vessel equivalents as outside the scope of generic burglary is also consistent with the purpose of the ACCA. The Act includes burglary among its list of "violent felonies" because it carries a high risk of violent confrontation. Yet, in contrast to homes and other primary residences, RV's, campers, and boats with sleeping quarters are vacant the vast majority of the time. Consequently, entering such a vehicle without au-

thorization is far less likely to result in any kind of personal confrontation.

The Government's principal response is that this Court should redefine generic burglary from scratch. According to the Government, "the empirical grounding and legal backdrop" of *Taylor* actually establish that generic burglary should, in fact, cover vehicles that are "adapted for overnight accommodation." U.S. Br. 33. This argument is irreconcilable with basic principles of *stare decisis*. While this Court is not beholden to every phrase or sentence in prior opinions, it is bound to give precedential effect to prior *holdings*. And the definition of burglary announced in *Taylor* constitutes the holding of the case. Furthermore, it is far from clear that the Government's *de novo* contentions are valid even on their own terms. Especially under these circumstances, and given Congress's longstanding acquiescence to *Taylor*, this Court should adhere to the definition of generic burglary it laid down in that case and has repeated several times since.

II. Even if this Court were to grant the Government's request to reinvent generic burglary from original source materials, the judgment below should still be affirmed. The second prong of the Arkansas residential burglary statute—unlike the Tennessee statute at issue in *United States v. Stitt* (No. 17-765)—covers *any* vehicle "[i]n which any person lives." Ark. Code Ann. § 5-39-101(4)(A)(i). This provision—which covers ordinary cars (for example, a Honda Civic or a Subaru Outback) in which a person happens to live—is unquestionably broader than the locational element of the generic crime.

Only nine states in 1986 had burglary statutes covering ordinary vehicles in which people lived; the vast majority of states defined burglary (as the other prong of Arkansas's statute does) based on the *nature or design* of a vehicle. The Model Penal Code explicitly excludes ordinary motor vehicles in which someone lodges from its scope. The criminal law treatise by Wayne LaFave, on which the Government heavily relies, did so as well. Lastly, the ACCA's purposes require excluding such locations from generic burglary. An individual entering an ordinary motor vehicle would not generally think it a place in which a person lives—and thus would not perceive any genuine risk of a violent altercation.

To be sure, there are no reported cases applying Arkansas's residential burglary statute to an ordinary vehicle in which a person was living. But the fact that the Arkansas statute itself plainly covers such automobiles resolves the categorical approach inquiry. Defendants must produce case law demonstrating the overbreadth of a state law only when their arguments rely on something other than statutory text—say, a common-law principle or the prospect of a court putting a counterintuitive gloss on a provision. Any generally applicable requirement to prove a state law has been applied in a particular manner would pose serious practical and equitable problems. It would also contravene the Sixth Amendment concerns that motivate the categorical approach in the first place.

III. If necessary to affirm, this Court should overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1999), and hold that the ACCA violates the

Sixth Amendment inasmuch as it increases a defendant's statutory sentencing range based on recidivist facts found by a judge instead of a jury. As Justice Thomas has detailed, the *Almendarez-Torres* exception to the rule otherwise requiring juries to find any fact that increases a defendant's sentence contravenes the original understanding of the Sixth Amendment. That constitutional infirmity should no longer be tolerated.

ARGUMENT

The Eighth Circuit correctly determined that the locational element of the Arkansas residential burglary statute encompasses a broader range of conduct than generic burglary. The Arkansas statute covers vehicles such as RV's, campers, and boats designed for occasional overnight accommodation, which cannot be shoehorned into the "building or structure" requirement this Court has established for generic burglary. But even if this Court were to revisit that definition, it would not matter. The Arkansas statute separately extends to *any vehicle at all* in which a person happens to live. There is no plausible argument from first principles or otherwise that generic burglary also extends to such vehicles.

I. ARKANSAS'S RESIDENTIAL BURGLARY STATUTE IS BROADER THAN "GENERIC" BURGLARY BECAUSE IT ENCOMPASSES VEHICLES DESIGNED FOR OCCASIONAL OVERNIGHT ACCOMMODATION.

A. The Locational Element of "Generic" Burglary Excludes Vehicles Designed for Occasional Overnight Use.

In *Taylor v. United States*, 495 U.S. 575 (1990), this Court was "called upon to determine the meaning of the word 'burglary' as it is used in [the ACCA]." *Id.* at 577. The Court "conclude[d] that a person has been convicted of burglary for purposes of [18 U.S.C.] § 924(e) if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, *a building or structure*, with intent to commit a crime." *Id.* at 599 (emphasis added).

Taylor and subsequent cases make clear that a "vehicle" is a distinct category of location from a "building" or "structure," at least when the vehicle is designed for only occasional overnight use. In *Taylor* itself, the Court repeatedly used state burglary statutes that extend to "automobiles" as the paradigmatic example of statutes that reached "more broadly" than generic burglary. 495 U.S. at 591, 599, 602. In *Shepard v. United States*, 544 U.S. 13 (2005), the Court further explained that burglary is generic "only if committed in a building or enclosed space . . . , *not* in a boat or motor vehicle." *Id.* at 15-16 (emphasis added). And in *Mathis v. United States*, 136 S. Ct. 2243, (2016), the Court reaffirmed that generic

burglary applies to "buildings and other structures, but *not* vehicles." *Id.* at 2250 (emphasis added); *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007) ("a car is not a 'building or structure'").

This Court has also made clear the ACCA's drafting history supports this limited definition of burglary. As initially passed in 1984, the ACCA classified an offense as burglary only if it involved an invasion of a "building." *Taylor*, 495 U.S. at 598. Although the 1986 amended statute omitted that definition, the Court explained in *Taylor* that its definition of generic burglary was "practically identical" to it. *Id.* at 598. Indeed, the "legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process." *Id.* at 589-90. "[N]o alternative definition of burglary was ever discussed," and "there simply is no plausible alternative that Congress could have had in mind." *Id.* at 598.

B. The Arkansas Statute Covers Vehicles Designed for Occasional Overnight Use.

1. It is readily apparent that Arkansas's residential burglary statute is broader than the definition of generic burglary laid down in this Court's case law. The locational element of the Arkansas residential burglary statute covers in part any "*vehicle* . . . [t]hat is customarily used for overnight accommodation of a person whether or not a person is actually present." Ark. Code Ann. § 5-39-101(4)(A)(ii) (emphasis added). This provision encompasses RV's and camp-

ers, along with houseboats and other watercraft with overnight sleeping quarters.[3]

Such objects are *vehicles* not only in name but also in function. Black's Law Dictionary defines "vehicle" as "[a]ny conveyance used in transporting passengers or things by land, water, or air." Black's Law Dictionary 1788 (10th ed. 2014). That description encapsulates the basic purpose of RV's, campers, and boats that contain sleeping quarters—namely, to enable transportation of people and things from place to place. Such instruments also allow users to sleep inside them on an occasional overnight basis. But they are not designed for prolonged lodging, much less use as a primary residence.[4] They are designed for movement. Consequently, the Arkansas statute's locational element is

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[3] For an example of such an application, see *Mountain Home Man Arrested on Burglary, Theft Charges*, The Baxter Bulletin (Aug. 26, 2011) (Arkansas residential burglary charge for invasion of unoccupied recreational vehicle). *See also Crime Spree Leads to Total Charges of 24 Felonies*, Springfield News-Leader (May 29, 2014) (Missouri residential burglary charge for invasion of an unoccupied houseboat).

[4] In exempting RVs from its mobile home regulations, the Department of Housing and Urban Development has defined an RV as a vehicle "designed only for recreational use *and not as a primary residence or for permanent occupancy*." Manufactured Home Procedural and Enforcement Regulations; Revision of Exemption for Recreational Vehicles, 81 Fed. Reg. 6806 (proposed Feb. 9, 2016) (to be codified at 24 C.F.R. §§ 3280, 3282) (emphasis added). Indeed, many local zoning ordinances forbid using RV's as a principal place of residence. *See, e.g.*, City of North Little Rock Zoning Ordinance § 12.10D(6)(b) ("No recreational vehicle shall be used as a permanent place of abode . . .").

categorically broader than the corresponding element of generic burglary.

2. The Government tries in two ways to shoehorn the vehicles covered by Arkansas's statute into this Court's definition of burglary. But neither attempt succeeds.

First, the Government embarks on a discussion of "mobile homes," contending that such abodes resemble in all pertinent respects "a colonial-style house" or other "immovable dwelling[]." U.S. Br. 25-26. It does not matter, however, whether the locational element of generic burglary can be stretched to cover mobile homes. The categorical approach requires the Government to show that Arkansas's residential burglary statute, in *all* of its applications, fits within generic burglary. *See, e.g.*, *Mathis*, 136 S. Ct. at 2248. And mobile homes are distinct from RV's, campers, and boats with sleeping quarters.

Mobile homes are living units that are "used as permanent residences" in a stationary manner. William P. McCarty, *Trailers and Trouble? An Examination of Crime in Mobile Home Communities*, Cityscape: A Journal of Policy Development and Research, Vol. 12, No. 2, at 129 (2010). They can be towed. But they are "difficult, if not impossible, to move." *Id.*; *see also State v. Ryun*, 549 S.W.2d 141, 142 (Mo. 1977) ("It is a typical mobile home, detached from the tow vehicle by which it may be moved [and] connected to an electricity transmission line.").

So too with respect to floating homes—the marine equivalent of mobile homes.[5] Like mobile homes, floating homes are designed to be primary residences and cannot function absent land-based utilities. *See Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 122 (2013) (noting that the floating home at issue "had no special capacity to generate or store electricity but could obtain that utility only through ongoing connections with the land"). Floating homes are thus qualitatively different from the types of watercraft that, to win this case, the Government must show fall within generic burglary: modest power boats and sailboats that contain sleeping quarters.

Second, the Government advances various arguments about "mobile structures," perhaps seeking to imply that RV's, campers, and boats with sleeping quarters can be characterized in those terms. *See* U.S. Br. 16-20, 23. But that is surely not how a speaker would refer to them in ordinary English. Nor would an attorney or scholar focused on the specific issue at hand: The criminal law treatise on which the Government repeatedly relies refers to a

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[5] The Government uses the word "houseboat" to describe a floating structure designed to be "a home." U.S. Br. 37. But a houseboat is akin to an RV: It is "a wide and slow-moving power boat propelled by an inboard or outboard engine . . . designed for short-term living and light cruising on inland lakes, rivers, canals, and bays." B. Flanagan, *The Houseboat Book* 20 (2003). The marine equivalent of a mobile home is a floating home, which "differs significantly from an ordinary houseboat in that it has no ability to propel itself" and functions as a primary residence. *Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 122 (2013).

"motor home" (a synonym for an RV) as a "vehicle," not a "mobile structure." 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(c) n.85 (1986).

This Court's precedent likewise distinguishes "structures" from "vehicles." *See supra* at 9-10. Most recently, in *Mathis* this Court assessed an Iowa statute that applied not only to a building or structure but also to certain "vehicles." 136 S. Ct. at 2250. Each of the opinions in the case took as given that the locational element of the statute was overbroad because of its inclusion of vehicles. *See id.* at 2242; *id.* at 2258 (Kennedy, J., concurring); *id.* (Thomas, J., concurring); *id.* at 2260 (Breyer, J., dissenting); *id.* at 2268 (Alito, J., dissenting).

The Government now reimagines *Mathis* as treating the Iowa statute as overbroad because it covered vehicles used only "for storage." U.S. Br. 36 n.3. But there is not one word in any of the four separate opinions in that case that so much as mentions that statutory language. Because generic burglary covers "buildings and other structures, but not vehicles," it was enough that the statute covered "vehicles." *Mathis*, 136 S. Ct. at 2250.

C. This Court Should Decline the Government's Request To Reconstruct a New Definition of Generic Burglary.

Insofar as the Arkansas residential burglary statute reaches more broadly than the "building or structure" definition set forth in *Taylor* and subsequent cases, the Government urges this Court simply to disregard that definition. According to the

Government, "the empirical grounding and legal backdrop" of *Taylor*, as well as its "discussion of the ACCA's design," actually support a more expansive definition than the Court announced. U.S. Br. 24, 33. The Government argues, in other words, that this Court should abrogate the holding of *Taylor* insofar as the underlying methodology used in that case supports a definition of "burglary" that encompasses invasions of the full range of vehicles covered by the Arkansas statute, including RV's and boats with sleeping quarters. The Government's approach misapprehends basic principles of *stare decisis* and is underwhelming even on its own terms.

1. *Taylor*'s Definition of Generic Burglary Is Entitled to *Stare Decisis* Effect.

a. The Government proceeds as if this Court's repeated pronouncements that generic burglary categorically excludes vehicles have been nothing more than the product of loose language. All that is necessary to rule in its favor, the Government suggests, is to read a few isolated "statements" in *Taylor* and subsequent opinions in the limited context in which they were made. U.S. Br. 35.

But *Taylor*'s definition of burglary was neither casually nor carelessly adopted. To the contrary, the passage in which the Court restricted the locational element of generic burglary to "a building or structure" reflects close attention and careful draftsmanship. 495 U.S. at 599. Indeed, the *Taylor* Court had directly before it other terms it could have chosen to define the locational element of burglary—and that might have accommodated the Government's expan-

sive view. For instance, the Model Penal Code expressly defined its locational element to cover "structures" *and* "vehicles" adapted for overnight accommodation. *See* Model Penal Code § 221.0(1) (1980). But the Court chose not to adopt that definition, nor the many others before it, choosing instead to define burglary as certain invasions of a "building or structure." *Taylor*, 495 U.S. at 599; *see also Stitt* Pet. App. 22a (Boggs. J., concurring).

More fundamentally, the Government's view of *stare decisis* is misguided. As the Government notes, "the language of an opinion is not always to be parsed as though we were dealing with the language of a statute." U.S. Br. 33-34 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979)). But there is a world of difference between mere language in an opinion and *the legal holding* this Court crafts to decide a case. Legal holdings are entitled to *stare decisis* effect. They may not be set aside in a future case simply because a later litigant argues that certain reasoning in the opinion—or even an underlying methodology it purports to apply—actually leads to a different conclusion than the one this Court announced. What is more, "the doctrine of *stare decisis* is most compelling" where, as here, a prior decision addressed a "pure question of statutory construction." *Hilton v. S.C. Pub. Rys. Comm'n*, 502 U.S. 197, 205 (1991).

Taylor's "building or structure" limitation is plainly part of the decision's legal holding—and thus is entitled to statutory *stare decisis* effect. As the Government itself recognized, the central task in that case was identifying "the proper definition of

the term 'burglary' in the 1986 statute." U.S. Br. *8, *Taylor v. United States*, 495 U.S. 575 (1990) (No. 88-7194), 1989 WL 1126976. And the Court framed the question presented in those terms, explaining it was "called upon to determine the meaning of the word 'burglary' as it is used in [the ACCA]." 495 U.S. at 577. The Court then answered that question. In a sentence beginning "We conclude," the Court enunciated the rule of the case. *See id.* at 599 ("We conclude that a person has been convicted of burglary for purposes of [the ACCA] if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.").

In short, *Taylor* did not merely apply a methodology to determine whether a particular state statute should be regarded as falling within the scope of "generic" burglary. Indeed, because it was "not apparent" which state statute formed the basis of Taylor's prior convictions, the case did not resolve *any* state-statute-specific question. 495 U.S. at 602. Instead, *Taylor* comprehensively defined "burglary" for purposes of the ACCA.

In the decades since *Taylor* was announced, Congress has taken no action to modify this Court's clear limitation of "burglary" to invasions of buildings or structures. The many years of inaction, coupled with this Court's repeated reiterations of *Taylor*'s definition in *Shepard* and *Mathis*, implies congressional acquiescence to this Court's interpretation of the statutory term. *See, e.g.*, *Watson v. United States*, 552 U.S. 74, 82-83 (2007) (deeming a 14-year

period, in which Congress did not attempt to overrule this Court's interpretation of a statute, to be a "long congressional acquiescence" that enhanced the usual precedential force accorded this Court's statutory interpretation decisions).

b. The Government's crabbed view of *Taylor*'s *stare decisis* effect would be particularly destabilizing because of the nature of the ACCA. Every time a new dispute over the scope of the locational element (or any other aspect) of generic burglary were to arise, the Government would have courts and litigants ask not whether the element falls within *Taylor*'s definition, but instead would require them to engage in a 50-state survey of the 1986 burglary statutes and attempt to discern what the "secondary sources" *Taylor* cited have to say on the issue. U.S. Br. 18-24. They would then have to comb through *Taylor*'s "discussion of the ACCA's design" to see whether the concerns expressed there "apply equally" to the conduct covered by the state law. U.S. Br. 24-25.

This is a recipe for endless litigation. The ACCA's interaction with state laws across the country is a complicated matter that is *already* exceptionally taxing on federal courts' resources. As Judge Bybee recently noted for the Ninth Circuit, courts have long "struggled to understand the contours" of ACCA's application to state convictions. *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 917 (9th Cir. 2011). "Indeed, over the past decade, perhaps no other area of law has demanded more of our resources." *Id.*; *see also United States v. Faulls*, 821 F.3d 502, 516 (4th Cir. 2016) (Shedd, J., concurring)

("[W]e are continuously called upon to determine whether past convictions—on a state-by-state basis—qualify as predicate offenses in multiple contexts, including sentencing."); *United States v. Thomas*, 2017 WL 6375741, at *3 n.2 (E.D.N.Y. Dec. 13, 2017) (noting that the categorical approach can be taxing on both courts and litigants because it requires "a legalistic assessment of a vast universe of statutes of conviction that are as varied as the states that enact them"). Against this backdrop, whatever certainty and predictability can be gleaned from this Court's case law should be safeguarded, not scuttled.

2. The Government's Arguments Are Flawed Even on Their Own Terms.

The difficulties that would result from the Government's approach are illustrated by examining how the secondary sources and other guideposts the Government would have courts examine apply to the Arkansas statute in this case. Such an examination shows it is far from clear that the Government's approach leads to the conclusion it espouses.

a. Start with the LaFave treatise that *Taylor* used as its primary source for its buildings-and-structures rule, and which the Government now advances to support its broader buildings-structures-and-at-least-some-vehicles rule. *See* U.S. Br. 22-24. In the sentence *Taylor* quoted, Professor LaFave explained that modern state statutes "typically describe the place as a 'building' or 'structure,' and these terms are often broadly construed." LaFave § 8.13(c). The next sentence of the treatise states: "Some burglary statutes also extend to still other places, such as all or some types of vehicles." *Id.*

The treatise, therefore, clearly explained that any statute covering even "some types of vehicles" was broader than usual. *Id.*

The Government nonetheless insists that LaFave cannot have meant what he said, because the statutes he cited in footnotes as examples of those covering "buildings" and "structures" also covered vehicles used or adapted for overnight accommodation. U.S. Br. 22-23. But even assuming footnotes of a treatise can cancel out its text, a foray into these footnotes reveals nothing more than a muddle. LaFave cited 13 statutes using the terms "building" and "structure" for the locational element of burglary. LaFave § 8.13(c) & nn.81-82. But those statutes offer wide-ranging definitions of those terms—covering everything from all vehicles, *see* Fla. Stat. ch. 810.02(1) (1985), to just those "designed . . . for residential use," *see* Ga. Code Ann. § 16-7-1 (1984). It seems, therefore, that LaFave (or, more likely, his research assistant) simply collected statutes that used the word "building" or "structure," without regard for how the statutes actually defined those terms. Any attempt to read something more into those citations would stretch them beyond their intended purpose.

If LaFave's footnotes demonstrate anything, another one indicates the Eighth Circuit was "right to reject the [Arkansas] statute as broader than generic ACCA burglary." *Stitt* Pet. App. 21a (Boggs, J., concurring). When LaFave focused directly on showing that some state stautes covered "other places" besides buildings and structures—and thus extended beyond typical statutes—he cited a Texas

law encompassing a "vehicle that is adpated for the overnight accommodation of persons." LaFave § 8.13(c) n.85 (citing Tex. Penal Code §§ 30.01, 20.02 (1986)). That language is substantially similar to the "customarily used" prong of Arkansas's statute.

The Model Penal Code does not advance the Government's cause either. Contrary to the Government's representations (U.S. Br. 20-22), *Taylor* did not draw its definition from that Code. *Taylor* merely observed in a footnote that the definition the Court had independently crafted "approximates that adopted by the drafters of the Model Penal Code." 495 U.S. at 598 n.8. This footnote is no more telling than the Court's statement elsewhere in the opinion that the definition it adopted was "practically identical" to a definition using only the term "building." *Id.* at 598.

Finally, the Government propounds the fact that the criminal codes of most states in 1986 treated invasions of "mobile structures" as burglary. *See* U.S. Br. 18-19. But just last Term this Court declared (at the Government's behest) that a multijurisdictional analysis "is not required by the categorical approach." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1571 n.3 (2017). It would be strange to hold that a factor not even essential to the categorical approach requires abandoning a prior holding establishing the generic definition of a crime—especially given that the Government itself concedes that convictions under almost half of the state laws it cites do not qualify as ACCA burglary, *see* Reply In Support of Certiorari, No. 17-765, at 7-8; U.S. Br. 18 & Appx. B, and that other states with laws *Taylor* ren-

ders overbroad have additional statues that fit within its definition of generic burglary, *see, e.g.*, Tenn. Code Ann. § 39-14-402(a)(1)-(3) (divisible provisions within separate "burglary" statute limited to "building[s]").

b. Exempting RV's, campers, and their marine equivalents from the locational element of generic burglary does not frustrate—but rather comports with—the ACCA's design.

Congress's aim in passing the ACCA was to "capture all offenses of a *certain level of seriousness* that involve violence or an inherent risk thereof." *Taylor*, 495 U.S. at 590 (emphasis added). And as the Government recognizes, burglary was included as a "violent felony" because of "its inherent potential for harm to persons." *Id.* at 588; *see* U.S. Br. 25. A person who "enters a building to commit a crime often creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate." *Taylor*, 495 U.S. at 588; *see James v. United States*, 550 U.S. 192, 203 (2007) (Congress was concerned with "the possibility of a face-to-face confrontation between the burglar and a third party").

The Government may be right (*see* U.S. Br. 25-26) that invading a mobile home carries a "level of seriousness," *Taylor*, 495 U.S. at 590, comparable to invading a single-family home. Both are typically used as a person's primary residence. *See supra* at 12. People spend most every night in their primary residences—whether they be houses, apartments, or mobile homes—and someone is likely home a good part of the day in such dwellings as well.

But vehicles such as RV's, campers, and boats with sleeping quarters present very different circumstances. Although such objects are adapted for overnight accommodation, they typically sit empty in driveways, parking lots, and marinas. In fact, RV's are occupied on average only *19 days* out of the year, or 5.2% of the time. *See* Richard T. Curtin, *The RV Consumer*, University of Michigan Survey Research Center 31 (2001).[6] The most common reason RV owners later sell the vehicles is that "they did not use it enough to justify its costs." *Id* at 9.

These phenomena are even more pronounced in the marine context. Even relatively humble sailboats and powerboats can have sleeping quarters. Yet many owners never actually use the boats for overnight accommodation; all too often the vessels sit vacant in the harbor. The odds of a violent confrontation respecting such a boat are accordingly exceptionally low. In fact, an invasion of a boat docked in a marina (or an RV parked on the street) is much more like an ordinary theft of property or trespass offense than burglarizing a home, and neither of the former offenses are enumerated ACCA predicates.

The Government protests that all of the types of invasions the Arkansas statute covers "lie at the heart of the crime of burglary." U.S. Br. 31 (internal quotation marks and citation omitted). But one of the cases it cites—*Smith v. United States*, 877 F.3d 720 (7th Cir. 2017)—shows that just the opposite is true. The Illinois statute deemed in that case to fall

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[6] https://data.sca.isr.umich.edu/fetchdoc.php?docid=25919 (last visited August 14, 2018).

within generic burglary covers "mobile homes" and "trailers"—the types of objects that could plausibly be regarded as "structures" because they are typically used as primary residences and sit still in a permanent location. *Smith*, 877 F.3d at 723 (quoting in part 720 ILCS 5/2-6(b) (1982)). But the statute does *not* encompass the types of vehicles also at issue here—"vehicle[s] . . . intended for use as a human habitation." *Id.* at 722 (quoting (720 ILCS 5/2-6(a)).

This Court should likewise adhere to the distinction in its prior cases between objects that are fundamentally homes and those that are fundamentally vehicles and reject the Government's attempt to treat distinctly different conduct as equivalent for purposes of the ACCA's enhancement.

c. If any lingering doubt remains, the rule of lenity dictates adhering to the rule *Taylor* announced and excluding from generic burglary at least those vehicles that are not typically used as a primary residence. The "time-honored interpretive guideline" of lenity "serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990). That rule applies equally to the construction of sentencing statutes. *See, e.g., United States v. Granderson*, 511 U.S. 39, 54 (1994) (the government's proffered interpretation must be "unambiguously correct"); *Busic v. United States*, 446 U.S. 398, 406-07 (1980) ("a clear and definite legislative directive" is necessary); *Bell v. United States*, 349 U.S. 81, 84 (1955) ("Congress [must] fix the punishment for a federal offense clearly and without ambiguity").

When this Court determines the meaning of a statute, that constitutes "an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994). Accordingly, since 1990, the public has been on notice only that convictions under state statutes that extend to "buildings" or "structures" may qualify as "generic burglary" under the ACCA. In light of this Court's prior pronouncements, and the history and purpose of the statute, there is at least an ambiguity over whether vehicles such as RV's are included within the meaning of burglary in the federal statute, and that ambiguity should be resolved in respondent's favor.

II. THE ARKANSAS STATUTE IS OVERBROAD EVEN UNDER THE GOVERNMENT'S PROPOSED METHODOLOGY BECAUSE IT ALSO COVERS VEHICLES NOT ADAPTED FOR LODGING AT ALL.

Even if this Court accepted the Government's proposal to rerun *Taylor*'s underlying analysis, the Arkansas residential burglary statute would still not fall within the scope of generic ACCA burglary. The question presented is whether vehicles "adapted *or used* for overnight accommodation" fall within generic burglary. U.S. Br. I (emphasis added). Yet the Government fails separately to address this aspect of the Arkansas statute's locational element, which extends to vehicles that are *not* adapted or customarily used for overnight use but in which a person *nevertheless happens to live*. Such vehicles are indisputably beyond the reach of generic burglary.

A. The Arkansas Statute Encompasses Vehicles Not Customarily Used For Overnight Accommodation, But in Which a Person Happens to Live.

Despite the Government's effort to lump the statutes together, *see, e.g.*, U.S. Br. 31, the Arkansas statute is broader than the Tennessee statute at issue in *Stitt*, and others akin to the Model Penal Code. Similar to those statutes, one prong of the Arkansas statute covers any vehicle "[t]hat is customarily used for overnight accommodation of a person." Ark. Code Ann. § 5-39-101(4)(A)(ii). But another prong of the Arkansas statute, in a separately numbered subsection, also covers any vehicle "[i]n which any person lives." Ark. Code Ann. § 5-39-101(4)(A)(i). That subsection, which the Government recites (U.S. Br. 32) but then ignores in its analysis, covers vehicles that are *not* adapted or customarily used for overnight accommodation but in which a person nevertheless happens to live. On its face, then, the text of the Arkansas statute covers not just RV's and the like, but also any vehicle of any kind in which a person happens to live—say, a Honda Civic or a Subaru Outback.

B. Ordinary Vehicles in Which Someone Happens to Live Do Not Fall Within the Locational Element of Generic Burglary.

The Government does not dispute that an ordinary motor vehicle falls outside the scope of "generic" burglary's locational element. *See* U.S. Br. 21, 24, 34. Nor could it. As this Court has noted on numerous occasions, an ordinary motor vehicle is different from a "building" or "structure." *See supra* at 9-10

(recounting authority). And even employing the methodology that the Government urges this Court to undertake to redefine generic burglary, there is no plausible argument that the crime extends to any vehicle in which a person happens to live.

1. *Multijurisdictional analysis.* Looking to the way the term "burglary" was used in "most states" in 1986, there were at most nine states, including Arkansas, with burglary statutes that similarly extended to any motor vehicle depending on whether someone lived there or used it for lodging.[7] That is, the vast majority of the statutes the Government cites focused on the nature and design of a vehicle, not, like the Arkansas statute, on how the vehicle is *actually used*. And those statutes covered only those vehicles designed for overnight accommodation.

2. *Secondary sources.* The Model Penal Code explicitly excludes ordinary cars used for habitation from the scope of burglary, covering instead only vehicles "*adapted* for overnight accommodation." Model Penal Code § 221.0 (1980) (emphasis added). The Code's commentary states that this limitation "serves to exclude from burglary intrusions into freight cars, motor vehicles other than home trailers or mobile offices, ordinary small watercraft, and the like," even though "a person *could* sleep or conduct

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[7] *See* Ala. Code §§ 13A-7-6; 13A-7-1 (1983); Haw. Rev. Stat. Ann. §§ 708-811; 708-800 (1985); Ky. Rev. Stat. Ann. §§ 511.020; 511.010 (1985); Mo. Ann. Stat. §§ 569.170; 569.010 (1984); N.Y. Penal Law §§ 140.20; 140.00 (1986); N.D. Cent. Code Ann. §§ 12.1-22-02; 12.1-22-06 (1985); Ohio Rev. Code Ann. §§ 2911.12(A); 2909.01(C) (1985); S.C. Code Ann. §§ 16-11-313; 16-11-310 (1985).

business in such a place." Model Penal Code § 221.1 cmt. (3)(b).

The commentary also ties this limitation to the theoretical underpinnings of burglary. The "essential notion" animating burglary, the commentary explains, is to punish invasions of locations with an "apparent potential for regular occupancy." Model Penal Code § 221.1 cmt. (3)(b). That being so, the fact that an ordinary motor vehicle or watercraft is actually being used for habitation is irrelevant. *Id.* Such places are "not the sorts of facilities that ordinarily would put an intruder on notice that they may be in use for such purposes." *Id.*[8]

The LaFave treatise is in accord. Even if the Government were correct that the treatise is best read to suggest that states typically included vehicles adapted for overnight accommodation in their burglary statutes, the treatise contains no indication whatsoever that a statute that reaches *beyond* vehicles adapted for overnight accommodation is (to borrow the Government's word) "typical," U.S. Br. 23. Only one of the 13 statutes (Missouri's) LaFave cited as examples of statutes extending to buildings or structures covered a location based on how it was actually used. *See* LaFave § 8.13(c) & nn.81-82.

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[8] The common law also recognized that the penalties of burglary do not turn on a location's actual use. Discussing why invasion of a tent in a marketplace would not be a burglary even "though the owner may lodge therein," Blackstone explained that "his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted wagon in the same circumstances." 4 William Blackstone, Commentaries on the Laws of England *226 (1769).

3. *ACCA's design.* The ACCA's design also supports a locational element for "burglary" that "focus[es] on the nature of the property or place, not on the nature of its use at the time of the crime." *United States v. Rainer*, 616 F.3d 1212, 1215 (11th Cir. 2010). The essential purpose of the ACCA's burglary classification is to identify dangerous career criminals—those who repeatedly invade locations with knowledge (or at least fair notice) that there is an inherently strong potential for harm to other persons. *See supra* at 22. As *Taylor* put it, "the offender's own awareness of" the possibility of violent confrontation indicates that "he is prepared to use violence if necessary to carry out his plans or to escape." *Taylor v. United States*, 495 U.S. 575, 588 (1990).

All an individual can be reasonably aware of in advance of invading an automobile is the vehicle's appearance and intended use. If, therefore, an individual targets an ordinary motor vehicle, he would not expect it to be a place in which a person lives. Congress would not have thought that a person who was previously convicted of violating a statute covering an ordinary motor vehicle is as dangerous (or as deserving of enhanced punishment) as an individual who previously invaded a single-family dwelling (or even a mobile home).

C. The Facial Overbreadth of the Arkansas Statute Dictates that Respondent's Convictions Are Not For ACCA "Burglary."

No Arkansas court appears to have published an opinion dealing with burglary in the context of an ordinary car in which someone happens to live. But

that is of no moment. Because the plain text of Arkansas's statute covers such conduct, reaching far beyond the locational element of generic burglary, respondent's convictions under that statute cannot qualify as "violent felonies" under the ACCA.

1. This Court's precedent establishes that where "the elements of [the defendant's] crime of conviction . . . cover a greater swath of conduct than the elements of the relevant [generic] offense," that disparity "resolves th[e] case." *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). There is no need to look beyond the plain-text comparison. *See id.* (holding that state statute was overbroad based solely on textual comparison); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017) (same; petitioner "needs no more to prevail"); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1988-90 (2015) (same); *Descamps v. United States*, 570 U.S. 254, 264-65 (2013) (same).

Mellouli is particularly informative. There, this Court considered whether a conviction under a Kansas statute was categorically a conviction "relating to a controlled substance (as defined in [federal law])." 135 S. Ct. at 1984. The state statute expressly encompassed several non-federally-controlled substances. Endorsing the reasoning of the decision below, however, the Government argued that the state statute was not actually broader than the generic offense because the petitioner could identify "no Kansas paraphernalia prosecutions involving non-federally-controlled substances." U.S. Br. 39-40 n.6, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015) (No. 13-1034). In the Government's view, therefore, "there [was] little more than a 'theoretical possibility' that a

conviction under Kansas law will *not* involve a controlled substance as defined [under the generic offense]." *Id.* (quoting *Mellouli v. Holder*, 719 F.3d 995, 997 (8th Cir. 2013)).

This Court was unmoved. Observing that the text of the state law "was not confined to federally controlled substances," the Court held that the law was broader than its generic counterpart. *Mellouli*, 135 S. Ct. at 1988. The categorical approach did not allow the Government to "reach[] state-court convictions . . . in which no controlled substance as defined [in the federal code] figure[d] as an element of the offense." *Id.* at 1990 (internal quotation marks omitted).

While certain aspects of the categorical approach are unusual—even controversial—this plain-text methodology comports with this Court's broader jurisprudence, in which the plain meaning of statutes controls. In *United States v. Stevens*, 559 U.S. 460 (2010), for example, a federal statute criminalized any depiction "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed." *Id.* at 465 (quoting 18 U.S.C. § 48(c)). The defendant claimed that the statute violated the First Amendment's overbreadth doctrine because it encompassed hunting magazines and other protected speech. The First Amendment's overbreadth doctrine requires a showing even more demanding than the categorical approach—namely, that "a substantial number of [the challenged statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* at 473 (quoting *Wash. State Grange v. Wash. State Republican Par-*

ty, 552 U.S. 442, 449 n.6 (2008)). But the Court deemed immaterial the Government's representation that it "neither has brought nor will bring a prosecution" based on any protected speech. *Id.* at 480 (quoting Government's reply brief). It was enough that a "natural reading" of the statute encompassed such speech. *Id.* at 480-81.

2. There is no doubt that the plain meaning of Arkansas's residential burglary statute is facially broader than the locational element of generic burglary. Arkansas courts employ customary tools of statutory construction, including the rule that when "the plain language of the statute . . . is clear and unambiguous . . . the plain meaning of the words" governs. *Nat'l Home Centers, Inc. v. Coleman*, 283 S.W.3d 218, 222 (Ark. 2008). The Arkansas Supreme Court also follows the rule that statutes should be construed "so that no word is left void, superfluous, or insignificant," and thus "gives meaning and effect to every word in the statute, if possible." *Holbrook v. Healthport, Inc.*, 432 S.W.3d 593, 597 (Ark. 2014) (citations omitted).

These principles confirm beyond dispute that Ark. Code Ann. § 5-39-101(4)(A)(i) encompasses any vehicle of any type in which a person happens to live. That subsection covers "a vehicle . . . [i]n which any person lives." It places no limit on the type of "vehicle" that will suffice, and "vehicle" is separately defined broadly as "any craft or device designed for the transportation of a person or property across land or water or through the air." *Id.* § 5-39-101(5). The only qualifier is that a person be living in the vehicle. And the original Arkansas Commentary to § 5-39-

101 underscores that "[v]ehicles and boats are included" in the statute's ambit "if persons live (whether permanently or temporarily) . . . therein."[9]

That plain-text reading is reinforced by the rule against superfluity. The Arkansas statute covers any vehicle "(i) [i]n which any person lives; *or* (ii) [t]hat is customarily used for overnight accommodation of a person." Ark. Code Ann § 5-39-101(4)(A) (emphasis added). Given the disjunctive "or," the first and second subsections must have "separate meanings." *United States v. Woods*, 571 U.S. 31, 45 (2013) (quoting *Reiter v. Sonotone Corp.* 442 U.S. 330, 339 (1979)). And the only way to give the first subsection such independent force is to honor its plain language, which applies to *any* vehicle in which someone *actually* lives, even if it is a type of vehicle not customarily used for that purpose.

Indeed, the Sixth Circuit has recognized that similar language in Kentucky's burglary statute is necessarily broader than a statute that covers only vehicles "adapted for [overnight] accommodation." *United States v. Brumback*, 614 F. App'x 288, 292 (6th Cir. 2015). In that case, the court went on to hold that even if generic burglary covers a vehicle or boat adapted for overnight accommodation, it does not extend to any vehicle "[w]here any person lives." *Id.* So too here: The facial overbreadth of Arkansas's

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[9] https://archive.org/search.php?query=arkansas%20code%20commentaries; *see State v. Reeves*, 574 S.W.2d 647, 649 (Ark. 1978) (Arkansas legislative commentary is authoritative unless a court is "clearly convinced that it is erroneous or that it is contrary to the settled policy of this state, as declared in opinions of [the Arkansas Supreme Court]").

any-vehicle-in-which-a-person-lives provision independently renders the burglary statute categorically broader than its generic counterpart.

3. This Court held in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), that when a party arguing that a state law is overbroad bases his argument on something other than statutory language (there, the prospect that a state court would apply an aspect of the aiding and abetting doctrine in an unusually broad manner), he must show a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* at 193. To make that showing, the party must identify "cases in which the state courts" have actually applied state law in a nongeneric manner. *Id.* Mere resort to "legal imagination" will not do. *Id.*

But as the vast majority of the courts of appeals to have considered the question have held, *Duenas-Alvarez* does not apply where, as here, a state statute of conviction *itself* is facially broader than the "generic" federal crime at issue. Where "a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (citation omitted); *accord Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017); *Hylton v. Sessions*, ___ F.3d ___, 2018 WL 3483561, at *6 (2d Cir. July 20, 2018); *Singh v. U.S. Att'y Gen.*, 839 F.3d 273, 286

n.10 (3d Cir. 2016); *United States v. Henriquez*, 757 F.3d 144 (4th Cir. 2014); *Mendieta-Robles v. Gonzales*, 226 F. App'x 564, 572 (6th Cir. 2007); *Vassell v. U.S. Att'y Gen.*, 839 F.3d 1352, 1362 (11th Cir. 2016); *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013); *but see Vasquez v. Sessions*, 885 F.3d 862, 872-74 (5th Cir. 2018), *cert. denied*, 138 S. Ct. 2697 (2018).[10]

Here, no Arkansas decision remotely suggests that its burglary statute does not mean what it says: The locational element of respondent's convictions includes any "vehicle . . . [i]n which any person lives." Ark. Code Ann. § 5-39-101(4)(A)(i). And the possibility that an individual would invade a motor vehicle in which another person lives is hardly a speculative machination. It is an unfortunate reality in America (as numerous studies and news reports confirm) that many people do in fact live in ordinary motor vehicles, either temporarily or permanently. *E.g.*, Ian Urbina, *Keeping It Secret as the Family Car Becomes a Home*, NY Times (Apr. 2, 2006). Even though such people typically spend their days away from their vehicles, they sleep sitting up in ordinary

[10] In its brief in opposition in *Vasquez*, the Government distinguished the Fifth Circuit's decision from most others that have held *Duenas-Alvarez* inapplicable under the circumstances here. The Government contended that special features of immigration law and the state law at issue there supported the Fifth Circuit's decision. *See* Br. in Opp. 18-19, *Vasquez v. Sessions*, 138 S. Ct. 2697 (2018) (No. 17-1304).

car seats. If questioned, they often "tell the police that they were just napping." *Id.*[11]

Perhaps the text of Arkansas's statute is so clear that no defendant prosecuted for burglarizing an ordinary car in which someone was living has bothered to dispute that the law covers such conduct. Or perhaps some such prosecutions in which the issue was raised have resulted in plea bargains with waivers of the right to appeal. Whatever the reason for the absence of any reported decision on the issue, the text of Arkansas's residential burglary statute speaks for itself. Any attempt to apply a reported-case requirement here would "wrench[] the Supreme Court's language in *Duenas-Alvarez* from its context." *Hylton*, 2018 WL 3483561, at *6 (internal quotation omitted).

3. Lest there be any doubt, conducting the categorical inquiry against the plain text of Arkansas's statute is essential here for at least two reasons.

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[11] *See also* Yolanda Putman, *A car to call home: Surprising number of homeless live in their vehicles, experts say*, Chattanooga Times Free Press (July 7, 2014), https://goo.gl/285J3G; Kevin O'Leary, *Last Refuge for the Homeless: Living in the Car*, TIME (Feb. 12, 2010), https://goo.gl/7AdgCr; *Homeless families living in cars*, 60 Minutes (Nov. 22, 2011), https://goo.gl/wjerLX; Darcy Spencer, *D.C. Woman Prefers Living in Car to Homeless Shelters*, NBC Washington (July 16, 2014), https://goo.gl/pgWuYP; Vianna Davila, *Seattle still doesn't know what to do with thousands of people living in vehicles*, Seattle Times (Apr. 10, 2018), https://goo.gl/JFBU8K; Antonio Olivo, *In a wealthy Virginia suburb, their cars are their beds*, Wash. Post (Oct. 3, 2016), https://goo.gl/5z5XAs; Zusha Elinson, *Homeless Lose a Longtime Last Resort: Living in a Car*, Wall Street Journal (Apr. 8, 2014), https://goo.gl/iJfQ2G.

a. A plain-text comparison is necessary to ensure the categorical approach promotes "efficiency, fairness, and predictability." *Mellouli*, 135 S. Ct. at 1987. The categorical approach advances those values "by precluding the relitigation of past convictions in minitrials conducted long after the fact." *Moncrieffe v. Holder*, 569 U.S. 184, 200-01 (2013); *see also Taylor*, 495 U.S. at 601 (categorial approach is designed to avoid "practical difficulties and potential unfairness"). This Court, therefore, has consistently rejected conceptions of the categorical approach that would require sentencing courts, "[i]n case after case, . . . to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Descamps*, 570 U.S. at 270.

Even greater difficulties would arise if defendants claiming the overbreadth of state statutes were always required to make showings—and sentencing courts make findings—regarding the facts of *other individuals' past convictions*. To begin, some "ninety-four percent of state convictions are the result of guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). Such cases rarely, if ever, generate reported decisions concerning the scope of substantive criminal law. Nor do the vast majority of other convictions—either because there is never an appeal (perhaps because the defendant sees nothing to be gained from challenging the plain language of the statute) or the state courts decline to write an opinion. As a result, a "lack of published cases or appel-

late-level cases does not imply a lack of convictions." *Nunez v. Holder*, 594 F.3d 1124, 1137 n.10 (9th Cir. 2010); *see also Whyte v. Lynch*, 807 F.3d 463, 469 (1st Cir. 2015) ("[W]hile finding a case on point can be telling, not finding a case on point is much less so.").

Nor is it feasible in the vast majority of states to search for records of state indictments or conviction records. Many such records are not maintained at all. *See* Peter M. Brien, Bureau of Justice Statistics, U.S. Dep't of Justice, *Improving Access to and Integrity of Criminal History Records* 9 (2005) (discussing the "extensive problem" of state criminal record databases lacking information regarding disposition). And for those that are, it is often practically impossible to search for such records. For many states, Westlaw does not provide access to any state criminal records. For others, coverage is often limited to specific counties—for example, Westlaw maintains criminal docket materials for only 2 of 105 counties in Kansas. *See* Thomson Reuters, *Court Dockets and Court Wire Coverage*.[12] Even then, criminal indictments and other records will often simply parrot the elements of the statute. *See Mathis*, 136 S. Ct. at 2257 n.7.

That leaves mere word of mouth. Public defenders and other criminal defense lawyers sometimes (but not always) have limited networks at their disposal. But even when they do, it is extremely difficult to ascertain whether a state has applied a crim-

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[12] https://legalsolutions.thomsonreuters.com/law-products/solutions/courtwire-dockets/map.

inal statute in any particular manner. Several years of a defendant's liberty should not hang on the random feedback a listserv inquiry may generate. All the more so where—as is often the case under the ACCA—the defense lawyer (and the prosecutor and judge) would need to make such inquiries respecting a far-flung state, with laws and practices that might be totally foreign from the one in which the current proceeding is taking place.

As if all of these complications and inequities were not already bad enough, they would be even more glaring in immigration cases (in which the categorical approach likewise applies, *see Mathis*, 136 S. Ct. at 2551 n.2). Noncitizens must often litigate categorical-approach issues without counsel, while detained, and without even a proficiency in English. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 16 (2015) (37% of noncitizens—and only 14% of detained noncitizens—secure legal representation in removal proceedings); Dep't of Justice, Executive Office for Immigration Review FY 2016 Statistics Sourcebook E1 (only 10% of noncitizens are able to proceed in English in removal proceedings).[13] The notion that such detainees in such cases could be reasonably expected to do anything more than read the state statute of conviction and show that it is broader than its generic counterpart is fanciful in the extreme.

b. The Sixth Amendment concerns underlying the categorical approach also require fidelity to the

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[13] https://www.justice.gov/eoir/page/file/fysb16/download.

plain text of state statutes. The Sixth Amendment's jury-trial guarantee forbids imposing punishment based on facts that a prior jury did not "necessarily" find. *Shepard v. United States*, 544 U.S. 13, 14 (2005); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000). And a jury verdict (or a guilty plea) establishes nothing beyond the defendant's past commission of the elements of the charged offense. *Shepard*, 544 U.S. at 14. Accordingly, the question under the categorical approach is whether the *elements* of the prior offense are the same as or narrower than the elements of the generic offense. *Descamps*, 570 U.S. at 257.

The place to look for the answer to that question is "the statutory definitions" of the prior offense. *Descamps*, 570 U.S. at 261 (quoting *Taylor*, 495 U.S. at 600). The statutory elements determine what a jury must have necessarily agreed upon (or a defendant must necessarily have pleaded guilty to) *"as a legal matter."* *Mathis*, 136 S. Ct. at 2255 n.6; *see also Descamps*, 570 U.S. at 261.

The upshot is this: When the plain text of a state crime defines an element more expansively than its generic counterpart, it is irrelevant under the categorical approach whether there is proof that the state statute has been applied in an overbroad manner. Imagine, for example, that a state "burglary" statute applied to a "building or vehicle." Even if there were no evidence that any person had ever been charged for burglarizing a vehicle in that state, there would be no Sixth-Amendment-compliant way to know whether a jury convicting under that statute

necessarily agreed as a legal matter that a home was burglarized rather than a vehicle.

That is essentially what happened in *Mathis*. The parties and this Court there agreed that the Iowa burglary statute "covers more conduct than generic burglary does" because on its face it extended to any "land, water, or air vehicle." *Mathis*, 136 S. Ct. at 2250. Neither party, nor this Court, attempted to demonstrate whether anyone had ever been charged in Iowa for burglary for breaking into a car, boat, or airplane. It was simply taken as given that the statute was overbroad *because the plain text of the statute was overbroad*.

The same is true here. The plain text of the Arkansas residential burglary statute defines the locational element of the crime as including any vehicle "[i]n which any person lives." Ark. Code Ann. § 5-39-101(4)(A)(i). There is simply no way to know from the bare fact of a conviction under this indivisible burglary statute whether someone was convicted of invading a vehicle "customarily used for overnight accommodation," because the statute explicitly lists as an alternative a vehicle "in which any person lives." In light of that reality, the categorical approach demands affirmance of the decision below.

III. THE ACCA'S ENHANCEMENT SCHEME VIOLATES THE SIXTH AMENDMENT.

Justice Thomas has taken the Sixth Amendment concerns that the ACCA presents a step farther and suggested that, "in an appropriate case," this Court should hold that the Act is unconstitutional whenever, as here, it exposes a defendant to a higher sen-

tence based on the fact of his prior convictions. *Shepard v. United States*, 544 U.S. 13, 28 (2005) (Thomas, J., concurring in part and concurring in the judgment). To be sure, a bare majority of this Court held in *Almendarez-Torres v. United States*, 523 U.S. 224 (1999), that the Sixth Amendment's jury-trial guarantee leaves an exception for such recidivist facts, allowing judges to find them by a preponderance of the evidence. But that holding has "no historical basis." *Apprendi v. New Jersey*, 530 U.S. 466, 521 (2000) (Thomas, J., concurring).

To the contrary, "[c]ases from the founding to roughly the end of the Civil War"—and then for another several decades after that—established that *any* fact, "including recidivism," that exposes the defendant to a higher sentence must be proven to a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at 501-02; *see also id.* at 502-18 (cataloging case law); *Almendarez-Torres*, 523 U.S. at 256-57 (Scalia, J., dissenting) (same). This rule was confirmed in Justice Story's *Commentaries on the Constitution* and numerous other treatises, including Bishop's "leading" treatise on the criminal law. *See Apprendi*, 530 U.S. at 500, 510 (Thomas, J., concurring) (citing 1 J. Bishop, Law of Criminal Procedure 50 (2d ed. 1872)). *Almendarez-Torres*, in short, constituted a "sharp break with the past"—one that flouts the "original meaning" of the Sixth Amendment. *Apprendi*, 530 U.S. at 518 (Thomas, J., concurring).

Five years ago, this Court confronted a prior decision that—like *Almendarez-Torres*—had created an ahistorical exception to the Sixth Amendment's jury-trial guarantee, enabling judges to find facts that in-

creased defendant's minimum (as opposed to maximum) sentences. "Because [the previous decision was] irreconcilable with the reasoning of *Apprendi* and the original meaning of the Sixth Amendment, [the Court] follow[ed] the latter." *Alleyne v. United States*, 570 U.S. 99, 116 n.5 (2013), *overruling Harris v. United States*, 536 U.S. 545 (2002). For all of the reasons Justice Thomas has already detailed, this Court should follow the same course here if necessary to affirm the decision below. *See Shepard*, 544 U.S. at 26-28 (Thomas, J., concurring in part and concurring in the judgment); *Apprendi*, 530 U.S. at 499-523 (Thomas, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit should be affirmed.

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August 14, 2018

No. 17-765

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

VICTOR J. STITT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Tennessee's aggravated burglary statute, Tenn. Code Ann. § 39-14-403, qualifies as a generic "burglary" under the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(ii).

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Respondent Victor Stitt respectfully requests this Court affirm the judgement of the U.S. Court of Appeals for the Sixth Circuit.

INTRODUCTION

Almost 30 years ago, this Court looked at the congressional record to determine what Congress meant by "burglary" in the Armed Career Criminal Act. The legislative record showed that Congress' 1984 definition of burglary, which included only buildings, may have been inadvertently deleted during a complex amendment process. In any event, there was no evidence that Congress was dissatisfied with the 1984 definition, and there was no dispute among the members of Congress on the applicable definition. With the legislative record in mind, this Court has repeatedly excluded vehicles from the definition of burglary, and Congress has not modified the definition based on this Court's interpretation. The government now asks this Court to usurp the role of Congress and redefine burglary to incorporate mobile locations never before included. This Court should decline to do so and affirm the Sixth Circuit Court of Appeals.

STATEMENT OF THE CASE

A. Legal Background

In 1984, Congress enacted the Armed Career Criminal Act, increasing the penalty for a felon in possession of a firearm for defendants with three qualifying predicate offenses. One such qualifying offense is "burglary," which Congress defined as unlawfully entering or remaining in a building with the intent to commit a crime. In 1986,

several amendments to the ACCA were made, and the definition of burglary was deleted.

In 1989, with no statutory definition of burglary remaining, this Court sought to determine what Congress meant by the term. *See Taylor v. United States*, 495 U.S. 575 (1990). After extensive review of the legislative records, *Taylor* held that ACCA burglary "ha[d] the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 592-599. *Taylor* did not define "building or structure" but noted that the definition "is practically identical to the 1984 definition." *Id.* at 598. The Court also noted statutes that extended beyond this definition by including other places, such as vehicles and vending machines. *Id.* at 599. Throughout the years, this Court has held mobile locations do not fall within the definition of buildings and structures. *See Shepard v. United States*, 544 U.S. 13, 15–16 (2005) (burglary does not include boats or motor vehicles); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186–87 (2007) (generic burglary does not include vehicles); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (burglary of a vessel is not a generic burglary); *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243, 2250 (2016) (Iowa burglary is broader than generic burglary because it includes land, water, and air vehicles.").

B. Factual and Procedural Background

Victor Stitt was convicted by jury of being a felon in possession of a firearm, in violation of 18 U.S.C. § 924(g). At sentencing, the district court found Mr. Stitt to have at least three prior convictions that qualified as violent felonies under the ACCA, 18 U.S.C. § 924(e). Having

been classified as an armed career criminal, Mr. Stitt's statutory penalty for his offense increased from a ten-year maximum to a fifteen-year mandatory minimum term of incarceration. The district court sentenced Mr. Stitt to 290 months in prison, and Mr. Stitt appealed. Cert. Pet. App. at 57a-58a.

On appeal, Mr. Stitt argued, in relevant part, that none of his prior convictions qualified as violent felonies under the ACCA. The government conceded this Court's decision in *Johnson v. United States*, __ U.S. __, 135 S. Ct. 2551 (2015), prohibited certain prior offenses from being qualifying predicates. Therefore, the issue on appeal was limited to whether Tennessee's aggravated burglary statute qualified as "burglary" under the ACCA. Cert. Pet. App. at 62a.

Tennessee aggravated burglary is burglary of a "habitation." Tenn. Code Ann. § 39-14-403. Tennessee defines habitation by listing various means by which a person may satisfy the element of habitation, including structures and vehicles that are designed or adapted for the overnight accommodation of persons and places that are "appurtenant to or connected with" those structures or vehicles. Tenn. Code Ann. § 39-14-401(1). Mr. Stitt's *Shepard* documents did not specify what type(s) of "habitation" were involved in his prior convictions for aggravated burglary. Sixth Cir. No. 14-6158, Stitt Reply, ECF 35, Page 17. On direct appeal, the Sixth Circuit did not consider Tennessee's broad definition of habitation and, relying on its own precedent, held Tennessee's aggravated burglary statute categorically qualified as "burglary" under the ACCA. Cert. Pet. App. at 64a.

Mr. Stitt filed a motion for rehearing en banc, arguing an intra-circuit conflict. The Sixth Circuit had previously held Tennessee's aggravated burglary statute was categorically a violent felony but had "reached the opposite conclusion about Ohio's similarly worded burglary statute." Cert. Pet. App. at 1a-2a. The Sixth Circuit granted Mr. Stitt's motion for rehearing to resolve this conflict.

The government initially conceded Tennessee's aggravated burglary statute covered more places than "buildings or structures." It argued, however, that the aggravated burglary statute was divisible and, therefore, the modified categorical approach applied. While in the en banc briefing stage, this Court issued its decision in *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243 (2016). The government then changed its position and argued Tennessee's aggravated burglary statute is not divisible but meets this Court's definition of "building or structure" because the vehicles are required to be adapted for overnight accommodations. Cert. Pet. App. at 5a, fn. 1.

The majority of the Sixth Circuit rejected the government's position, finding "the government's arguments . . . ignore the [Supreme] Court's clear and unambiguous language that 'building or other structure' excludes all things mobile or transitory." Cert. Pet. App. at 8a (emphasis in original). "[T]he Supreme Court has held fast to the distinction between vehicles and movable enclosures versus buildings and structures in every single post-*Taylor* decision." Cert. Pet. App. at 6a. "The Court's adherence to this distinction over the course of nearly thirty years persuade[d] [the Sixth Circuit] that the Court meant exactly what it said: vehicles and moveable enclosures fall outside the scope of generic burglary." Cert. Pet. App. at 6a-7a.

The Sixth Circuit reversed the district court and remanded for resentencing without the ACCA classification.

SUMMARY OF THE ARGUMENT

Congress enacted the Armed Career Criminal Act in 1984 and included a definition of burglary that covered only buildings. Congress inadvertently deleted the definition during a complex amendment process. With no definition of burglary remaining in the statute, this Court reviewed the legislative history to divine Congressional intent. This Court concluded Congress did not intend to change the definition of burglary from the one it mistakenly deleted. Nothing in the legislative history suggested Congress was dissatisfied with the 1984 definition, and the record reflected no dispute among members of Congress on the meaning of burglary. Based on Congress' intent, this Court defined burglary to include only buildings and structures. *See Taylor v. United States*, 495 U.S. 575 (1990).

After *Taylor*, Congress sought to recodify the missing definition of burglary multiple times. In every proposed legislation, the definition of burglary included only buildings. In the almost 30 years since *Taylor*, Congress never once proposed extending burglary to include mobile structures of any kind, regardless of whether they are adapted for overnight accommodations.

Taylor considered, but declined to adopt, a definition of burglary identical to the one now proposed by the government. Texas defined burglary of a habitation to include vehicles adapted for overnight accommodation

of persons. Tex. Penal Code § 30.01(1) (1989). The Model Penal Code defined burglary of an occupied structure to include vehicles adapted for overnight accommodation of persons. M.P.C. § 221.0 (1980). Despite these examples, this Court did not define burglary to include habitations, occupied structures, or vehicles adapted for overnight accommodations. Instead, this Court in *Taylor*, consistent with Congress' 1984 definition, defined burglary to include only buildings and structures.

The majority of circuit courts have understood *Taylor*'s definition to exclude vehicles, and the policy of stare decisis weighs heavily in support of maintaining this well-understood definition. Considerations of stare decisis have special force in the area of statutory interpretation. Congress' failure to modify this Court's interpretation in the nearly 30 years since *Taylor* enhances the special force of stare decisis in this case. Moreover, adopting the government's new definition of burglary would only add ambiguity and confusion where there was none. The government offers no definition of what makes a vehicle "adapted for overnight accommodations," and there is no clear consensus among the states on such a definition. The government's proposed definition does not satisfy the Fifth Amendment right to due process.

Even if this Court were to abandon its decades-old definition of burglary and adopt the government's new definition, Tennessee's aggravated burglary statute remains overbroad. Tennessee has defined habitation to include places "appurtenant to" buildings or vehicles. Extending burglary to places that are "appurtenant to" buildings and vehicles makes the statute overbroad.

Alternatively, this Court should overrule *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and hold the ACCA's sentencing enhancement structure violates defendants' Sixth Amendment rights by allowing a judge to make findings of fact that increase the statutory maximum penalty.

ARGUMENT

I. When Congress deleted the definition of burglary this Court was required to divine Congressional intent.

Congress enacted the Armed Career Criminal Act in 1984. The 1984 variant enhanced a sentence for a person convicted of being a felon in possession of a firearm if he or she had three previous convictions "for robbery or burglary, or both." 18 U.S.C. § 1202 (1984). Congress defined burglary as including "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. § 1202(c)(9) (1984).

In 1986, Congress recodified 18 U.S.C. § 1202 at 18 U.S.C. § 924(e). The statute slightly modified the definition of burglary by clarifying the term "felony." Firearm Owners' Protection Act, Pub. L. No. 99-308, § 104, 100 Stat. 458-59 (May 19, 1986). Burglary was defined in 18 U.S.C. § 924(e) as "any crime punishable by a term of imprisonment exceeding one year and consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense." 18 U.S.C. § 924(e)(2)(B) (May 1986).

Five months later, Congress again amended the ACCA with the Career Criminals Amendment Act of 1986. Pub. L. No. 99-570, § 1402, 100 Stat. 3207-39 (Oct. 27, 1986). This amendment replaced the language "for robbery or burglary, or both" with "for a violent felony or a serious drug offense, or both." *Id.* at § 1402(a). Congress included definitions for both "a violent felony" and "a serious drug offense." A violent felony was defined as "any crime punishable by imprisonment for a term exceeding one year that – (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at § 1402(b)(B).

In that latest amendment, the definition of burglary was deleted, perhaps inadvertently. *See Taylor v. United States*, 495 U.S. 575, 589-90 (1990) ("The legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process."). The ACCA was left, as it is now, without a definition of burglary.

Congress attempted to address this issue when the Senate passed a bill to recodify the deleted definition. S. 1711, 101st Cong. (1989). This definition was identical to the one deleted in the October 1986 amendment. *Id.*; *Taylor*, 495 U.S. at 590, fn. 5. Senator Joseph Biden, introducing the bill, explained that it "corrects an error that occurred inadvertently when the definition of burglary was deleted from the Armed Career Criminal statute in 1986. The amendment reenacts the original definition which was intended to be broader than common law burglary." *Taylor*, 495 U.S. at 590, fn. 5; 135 CONG. REC. S12722-01,

S12749, 1989 WL 185497, 101st Congress, 1st Sess. (Oct. 5, 1989)). The bill passed the Senate in October 1989 and was pending before the House of Representatives when this Court decided *Taylor*. *See id.*

The somewhat convoluted history of the ACCA left this Court, the Judiciary at large, and the fifty states, with some degree of doubt as to the actual definition of "burglary" under the statute. The potential for disparate results from federal courts applying the ACCA based on different state definitions of "burglary" led this Court to grant certiorari in *Taylor*. Without a statutory definition of burglary, this Court sought to divine Congress' intent. *See Taylor*, 495 U.S. 575.

II. *Taylor* concluded that Congress intended a definition of burglary that is "practically identical" to the definition inadvertently deleted in 1986, which categorically excluded vehicles.

Evidence of Congress' intent drove the *Taylor* Court's definition of burglary. The Court considered the ACCA's pre-1986 statutory definition of burglary, Congress' changes to the ACCA statute, and the legislative history related to the 1986 amendment and concluded Congress intended a definition similar to the one mistakenly deleted. Neither state law, the Model Penal Code, nor LaFave's treatise on substantive criminal law dictated the definition adopted by this Court. This Court remained focused on Congress' intent.

A. *Taylor* expressly rejected the notion that a state definition of "burglary" controls the definition of burglary under the ACCA.

Taylor first decided that Congress did not intend burglary to be defined by state law. *Taylor*, 495 U.S. at 588-89. Given that "'burglary' has not been given a single accepted meaning by the state courts" it would seem "implausible" that Congress would intend the definition of burglary in a federal statute to depend on the definition of burglary that happened to be adopted by the state of conviction. *Id.* at 580, 590. "[A]bsent a plain indication to the contrary, federal laws are not to be construed so that their application is dependent on state law." *Taylor*, 495 U.S. 575 at 591 (*citing Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 119-20 (1983)). Thus, burglary under the ACCA "must have some uniform[, generic] definition independent of the labels employed by the various States' criminal codes." *Taylor*, 495 U.S. 575 at 592.

B. *Taylor* cited legislative history to decipher Congressional intent and expressly rejected the notion that burglary should be defined based on the degree of harm posed.

Having decided state law does not drive the federal definition of burglary, the *Taylor* Court turned to legislative history to decipher what Congress meant. Naturally, it began with the definition Congress had previously provided: entering or remaining surreptitiously within a building that is property of another with intent to commit a crime. 18 U.S.C. § 924(e)(2)(B) (May 1986). The Court also examined the legislative records surrounding the deletion of the burglary definition by the Career

Criminals Amendment Act of 1986. Ultimately, this Court concluded, "[n]othing in the legislative history of the 1986 amendment shows that Congress was dissatisfied with the 1984 definition. All testimony and reports read as if the meaning of burglary was undisputed." *Taylor*, 495 U.S. at 589. In fact, the "legislative history as a whole suggests that the deletion of burglary may have been an inadvertent casualty of a complex drafting process." *Id.* at 589-90.

The Court considered the old common law definition of burglary but concluded modern day burglary had little in common with the ancient English law. *Id.* at 592-95. Most states had moved away from the common law definition, which required a breaking and entering of a dwelling at night with the intent to commit a felony. *Id.* at 593. More importantly, "[i]t seems unlikely that the Members of Congress, immersed in the intensely practical concerns of controlling violent crime, would have decided to abandon their modern, generic 1984 definition of burglary and revert to a definition developed in the ancient English law – a definition mentioned nowhere in the legislative history." *Id.* at 593-94.

The government argues *Taylor* must be read to include mobile structures adapted for overnight accommodations of persons because of the greater risk of harm posed by burglarizing a residence. Br. of Pet., p. 26-27. Such a proposal bears a striking resemblance to one suggested by the Petitioner in *Taylor*. Specifically, the Petitioner argued, "Congress meant to include as predicate offenses a subclass of burglaries whose elements include 'conduct that presents a serious risk of physical injury to another,' over and above the risk inherent in ordinary burglaries." *Taylor*, 495 U.S. at 597. *Taylor* expressly rejected that

argument. *Taylor* clearly states that burglary should not be defined to include first-degree or aggravated burglary statutes *because* they posed an increased risk of harm to persons. *See id.* at 596-98. The Court concluded that the statutory language and the legislative history of the ACCA did not support the Petitioner's position. *Id.* at 596-97. "Congress presumably realized that the word 'burglary' is commonly understood to include not only aggravated burglaries, but also run-of-the-mill burglaries involving an unarmed offender, an unoccupied building, and no use or threat of force." *Id.* at 597. *Taylor* therefore did not construct a definition based on the risk of harm. To the extent the government now urges this Court to redefine burglary based on the risk of harm, this Court should again reject that argument for the very same reasons it did so in *Taylor*.

After considering the legislative history, this Court defined generic burglary as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 592-599. This definition "is practically identical to the 1984 definition," *id.* at 598, and categorically excludes vehicles.

C. *Taylor* considered, but declined to adopt, a definition identical to the one now proposed by the government.

The government argues that at the time *Taylor* was decided, Texas burglary "covered all vehicles and so [their provisions] were clearly not generic under *Taylor*." Br. for Pet., p. 35, (quoting *Stitt* at 49a (Sutton, J., dissenting)). They go on to suggest that, "*Taylor* had no occasion to

consider whether a more finely tuned burglary statute . . . satisfied its generic definition." Br. for Pet., p. 35. This is incorrect.

The *Taylor* Court reviewed a variety of sources containing statutes that are virtually identical to the new definition the Government now proposes. Therefore, the *Taylor* Court had ample opportunity to include such language, or some derivative thereof, in its generic definition. This Court chose not to do so. This Court should stand by the express language of *Taylor* as understood and applied by federal courts for nearly thirty years.

For example, *Taylor* cited Texas burglary as one example of a state law that was broader than generic burglary because it included vehicles. Texas burglary criminalized unlawfully entering a habitation or a building. *See* Tex. Penal Code § 30.02(a)(1) (1989). "Habitation" was defined as "a structure or vehicle that is adapted for the overnight accommodation of persons, and includes (A) each separately secured or occupied portion of the structure or vehicle; and (B) each structure appurtenant to or connected with the structure or vehicle." Tex. Penal Code § 30.01(1) (1989). Texas had a separate statute criminalizing burglary of vehicles not classified as a habitation. Tex. Penal Code §§ 30.01(3), 30.04 (1989). Texas' definition of habitation only included vehicles adapted for overnight accommodation; it did not include all vehicles. Texas' broad definition of habitation was therefore squarely before this Court for consideration in *Taylor*. *See Taylor*, 495 U.S. at 591 (citing Tex. Penal Code Ann. §§ 30.01-30.05 (1989 and Supp. 1990)). This Court declined to adopt a similar definition.

Taylor also considered, but did not adopt, the Model Penal Code's (M.P.C.) definition. *See Taylor*, 495 U.S. at 598, fn. 8 (burglary definition "approximates" the M.P.C.). The M.P.C. defined burglary as "enter[ing] a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein, unless the premises are at the time open to the public or the actor is licensed or privileged to enter." M.P.C. § 221.1 (1980). It further defined occupied structure as "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." M.P.C. § 221.0 (1980). The government believes *Taylor* must have intended to include vehicles adapted for overnight accommodations because that is how the M.P.C. defined occupied structure. *See* Br. for Pet., pp. 21-22. Yet, the government makes no argument that *Taylor*'s definition of generic burglary includes vehicles used for carrying on business. This Court did not adopt the M.P.C.'s definition of burglary. More to the point, if this Court in *Taylor* had intended to include all places adapted for the overnight accommodations of persons, it could have easily constructed such a definition using the Model Penal Code and Texas statutes as an example.[1] It did not do so.

The Court considered Professor LaFave's treatise on substantive criminal law, but this treatise does not support the government's interpretation of *Taylor*. In defining

1. "The Court could have said 'building or structure or dwelling.' It could have said 'building or structure or *other* dwelling.' It could have said 'building or structure *or other place adapted for overnight accommodation*.' But it didn't. It said 'building or structure." *United States v. Stitt*, 860 F.3d 854, 858, 865 (6th Cir. 2017) (en banc) (Boggs, J., concurring).

burglary to include only "buildings" and "structures," *Taylor* cited to page 471 of LaFave's treatise. The relevant portion of that page stated:

> There is no jurisdiction which retains the common-law requirement that the offense take place against a dwelling house or building within its curtilage for all degrees of the offense, though some require that the offense be against a dwelling house for a higher grade of the offense. Modern statutes instead typically describe the place as a "building" or "structure," and these terms are often broadly construed. Some burglary statutes also extend to still other places, such as all or some types of vehicles.

Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 8.13(c), page 471 (1986). In a footnote, LaFave provided examples of various state burglary statutes that covered vehicles, including, Texas Penal Code § 30.01, which, as discussed above, defined "habitation" as "a structure or vehicle that is adapted for the overnight accommodation of persons." *See* LaFave, § 8.13(c), page 471-72, fn. 85 (1986). LaFave explained that including some types of vehicles made sense, like Wisconsin's statute that included "[a] motor home or other motorized type of home or a trailer home," W.S.A. 943.10 (1)(e) (1989), but cautioned that many of the states have "broadly interpreted [the statutes] to extend to situations which ought not to be treated as burglary." LaFave, § 8.13(c), page 471-72, fn. 85.

Thus, the *Taylor* Court was well aware of various state statutes that covered vehicles adapted for overnight accommodations and declined to adopt a definition incorporating those locations. The Court cited specifically to page 471 of LaFave's treatise and Texas Penal Code § 30.01 but did not define burglary to include vehicles adapted for overnight accommodations. Instead, the Court adopted a definition to include only buildings and structures: a definition that is "practically identical" to the definition accidentally deleted by Congress in 1986, which covered only buildings. *Taylor*, 495 U.S. at 598. *Taylor* concluded that Congress may have inadvertently deleted the definition during the last amendment to the statute but "[i]n any event, there is nothing in the history to show that Congress intended in 1986 to replace the 1984 'generic' definition of burglary with something entirely different." *Id.* at 590. That definition did not cover nonpermanent or mobile structures, regardless of whether they had been adapted for overnight accommodations or not.

III. Despite numerous bills to add a definition of burglary, Congress has never proposed extending ACCA burglary to places beyond buildings. This Court should not contravene Congressional intent by extending *Taylor*.

Legislative history post-*Taylor* supports this Court's definition to exclude nonpermanent or mobile structures. Senate Bill 1711 was pending in the House of Representatives at the time *Taylor* sought to recodify the previously deleted ACCA definition of burglary. The House did not pass S. 1711 and it never became law. After S. 1711, Congress made several additional attempts to add a definition of burglary back into the ACCA. In each bill,

the definition of burglary remained the same: "entering or remaining surreptitiously within **a building** that is property of another with intent to engage in conduct constituting a Federal or State offense." (emphasis added). Mr. Stitt is unaware of any proposed bill that would have broadened the definition to any place other than a building.

During the 101st Congress, in addition to S. 1711, two senators proposed amendments to Senate Bill 1970 to add the old definition of burglary. 136 CONG. REC. S7154-01, S7162, 1990 WL 291502, 101st Congress, 2nd Sess. (June 5, 1990); 136 CONG. REC. S7197-01, S7215, 1990 WL 74864, 101st Congress, 2nd Sess. (June 5, 1990). No action was taken on either of the proposed amendments.

In the 102nd Congress, at least seven bills or amendments were presented in an attempt to add the ACCA definition of burglary back into the ACCA. In the first session of the 102nd Congress, Senator Biden introduced Senate Bill 618, which contained the same definition of burglary as the one deleted in 1986. 137 CONG. REC. S3021-02, S3058, 1991 WL 32507, 102nd Congress, 1st Sess. (Mar. 12, 1991). This bill did not pass the Senate. In June 1991, Senator Biden introduced Senate Bill 1241. This bill included an identical definition of burglary and passed the Senate in July 1991. In November of 1991, the Senate incorporated S. 1241 into H.R. 3371. The H.R. 3371 passed the Senate with amendments but the differences were never resolved with the House and, therefore, was never enacted into law.

In the second session of the 102nd Congress, Senator Strom Thurmond introduced Senate Bill 2305, which included the same definition of burglary. 138 CONG. REC.

S2674-04, S2697, 1992 WL 39583, 102nd Congress, 2nd Sess. (Mar. 3, 1992). This bill never passed the Senate. In May 1992, Senator Phil Gramm proposed an amendment to Senate Bill 652 to add the definition of burglary. 138 CONG. REC. S6115-02, S6132, 1992 WL 96466, 102nd Congress, 2nd Sess. (May 6, 1992). The Senate never adopted this amendment. In June of 1992, Senator Gramm proposed the same amendment to Senate Bill 55. 138 CONG. REC. S7802-01, S7828, 1992 WL 125816, 102nd Congress, 2nd Sess. (June 10, 1992). Senator Biden proposed a similar amendment to the same Senate Bill 55. 138 CONG. REC. S8002-02, S8013, 1992 WL 127222, 102nd Congress, 2nd Sess. (June 11, 1992). These amendments included a definition of burglary identical to the one deleted by Congress in 1986. The Senate did not adopt either amendment to S. 55. Lastly, in October 1992, Senator Bob Smith proposed an amendment to Senate Bill 2899 to include the missing definition of burglary. 138 CONG. REC. S16360-02, S16376, 1992 WL 274926, 102nd Congress, 2nd Sess. (October 2, 1992). The Senate did not adopt this amendment.

Congress continued to propose this very same definition of burglary in at least five bills or amendments during the 103rd Congress. In January of 1993, Senator Hatch introduced Senate Bill 8, which included the definition of burglary. 139 CONG. REC. S195-02, S304, 1993 WL 11908, 103rd Congress, 1st Sess. (Jan. 21, 1993). This bill never passed the Senate. In August of 1993, Senator Robert Dole introduced Senate Bill 1356, which contained the same definition of burglary. 139 CONG. REC. S10362-02, S10412, 1993 WL 293360, 103rd Congress, 1st Sess. (Aug. 4, 1993). This bill did not pass the Senate. In September 1993, Senator Biden introduced Senate Bill

1488. 139 CONG. REC. S12388-04, S12404, 1993 WL 373577, 103rd Congress, 1st Sess. (Sept. 23, 1993). Senate Bill 1488 did not pass the Senate. In August 1993, H.R. 2872 was introduced and included the definition of burglary under the ACCA. 139 Cong. Rec. H10191-02, H10241, 1993 WL 489922, 103rd Congress, 1st Sess. (Nov. 19, 1993). This bill did not pass the House. In November 1993, the Senate passed an amendment to H.R. 3355 to include the definition of burglary under the ACCA. 139 CONG. REC. S17095-03, S17108, 1993 WL 493791, 103rd Congress, 1st Sess. (Nov. 24, 1993). This bill eventually became Public Law No. 103-322 but did not retain the definition of burglary.

In all, over a period of four years Congress sought fifteen times to add the definition of burglary back into the ACCA. Every one of those proposed definitions included the identical definition of burglary that was deleted by Congress in 1984. Not once, during those four years or at any time since, did Congress propose a definition of burglary that would have extended to places other than buildings.

IV. This Court has consistently held that ACCA burglary does not include vehicles, and it should continue to maintain the ACCA's well-understood definition.

Throughout the years since *Taylor*, this Court has maintained the exclusion of vehicles from the definition of generic burglary. *Shepard v. United States*, 544 U.S. 13, 15–16 (2005) ("The [ACCA] makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle.");

Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186–87 (2007) (noting that Massachusetts defines burglary to include breaking into a vehicle, "which falls outside the generic definition of 'burglary,' for a car is not a 'building or structure'" (citations omitted)); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (noting that "breaking into a building" would qualify as generic burglary, but breaking into a "vessel" would not).

Even the government understood this Court's definition of burglary to exclude vehicles. *See e.g., United States v. Narvarro*, 584 F. App'x 624, 625 (9th Cir. 2014) ("The government concedes that a conviction for violating [Ariz. Rev. Stat. Ann. § 13-1501] does not qualify as generic burglary under the categorical approach because . . . generic burglary does not include burglary of movable structures and, under section 13-1501, the structure can be either moveable or immovable . . . ."). In *Mathis v. United States*, __ U.S. __, 136 S. Ct. 2243, 2250 (2016), the government conceded "that the Iowa burglary statute is broader than generic burglary, because generic burglary involves unlawful entry into a 'building' or 'structure,' *Taylor*, 495 U.S. at 599, and the Iowa statute prohibits unlawfully entering additional places, such as 'vehicle[s].'" Govt Merits Brief, 2016 WL 1165970, *5 (quoting Govt Sent. Mem. 3-4 (citing Iowa Code § 713.1 (1989) (defining burglary as unlawful entry into an "occupied structure") and Iowa Code § 702.12 (1989) (defining "occupied structure" through an enumerated list of places that includes buildings, structures, and vehicles.))).

Iowa Code § 702.12 (1989) defined "occupied structure" as "any building, structure, appurtenances to buildings and structures, land, water or air vehicles, **or similar**

place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein . . . ." (emphasis added). The government never took the position that a vehicle adapted for overnight accommodation of persons fell within the *Taylor* definition of burglary. On the contrary, the government conceded that including vehicles made Iowa's statute broader than generic burglary. *Mathis*, 136 S. Ct. at 2250; Govt Merits Brief, 2016 WL 1165970, *5, *44-45.

This Court in *Mathis* agreed that Iowa's burglary statute was not generic. *Mathis*, 136 S. Ct. at 2250. "The Court paid no attention to the limiting characteristics imposed by the Iowa statute – the requirement that any vehicle be 'adapted for overnight accommodation of persons. . . .' Instead, the Court flatly said that the Iowa statute is overbroad because it reaches 'land, water, or air vehicle[s],' full stop." *United States v. Herrold*, 883 F.3d 517, 538 (5th Cir. 2018) (en banc), *petition for cert. filed* Apr. 19, 2018 (No. 17-1445), *cross petition for cert. filed* May 29, 2018 (No. 17-9127).

In this case, the government never argued that generic burglary included nonpermanent or mobile enclosures adapted for overnight accommodations until *Mathis* was decided. *See* Supp. Reply Brief, *United States v. Stitt*, No. 14-6158 (6th Cir. Sept. 9, 2016), ECF 56, p. 5 ("In its supplemental brief the government argues, for the first time, that Tennessee's aggravated burglary statute is generic because the element of habitation "fits within the locational element of generic burglary described in *Taylor*."). It is the government's change in position that has caused confusion.

The circuit courts overwhelmingly agree that *Taylor* and its progeny exclude vehicles from the definition of generic burglary. *United States v. Lamb*, 847 F. 3d 928, 931 (8th Cir. 2017), *cert. denied* Apr. 2, 2018, (Wisconsin burglary statute "encompasses a broader range of conduct than generic burglary as defined in *Taylor*, such as burglary of railroad cars, ships, trucks, and motor homes."); *United States v. Gundy*, 842 F.3d 1156, 1169 (11th Cir. 2016), *cert. denied*, 138 S. Ct. 66 (2017), (holding Georgia's burglary statute is divisible and Gundy's convictions were "either dwelling houses or buildings housing a business, which are generic burglaries. Importantly, none [of the burglaries] were [of] vehicles, railroad cars, watercrafts, or aircrafts, which are not generic burglaries."); *United States v. Henriquez*, 757 F.3d 144, 146 (4th Cir. 2014) (holding Maryland's burglary statute is nongeneric because it "covers burglaries of motor vehicles or boats – places the United States Supreme Court has expressly excluded from generic burglary."); *United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014) (holding Alabama's burglary statute is not generic because "[a] number of [ ] things included in the definition of 'building' (such as vehicles and watercraft) fall outside the 'building or structure' element of generic burglary."); *United States v. Grisel*, 488 F.3d 844, 851, fn.5 (9th Cir. 2007) (en banc), *cert. denied*, 552 U.S. 970 (2007), ("To the extent that our precedents suggest that state statutes satisfy the categorical inquiry when they define burglary to include non-buildings adapted for overnight accommodation, they are overruled."); *United States v. Bennett*, 100 F.3d 1105, 1109 (3rd Cir. 1996) (holding Pennsylvania's burglary statute is broader than generic because it "includes within its definition of occupied structure any vehicle adapted for overnight accommodations or for business.").

The few decisions that erroneously include vehicles adapted for overnight accommodation in the generic definition rely on a Tenth Circuit case decided before *Shepard*, *Nijhawan*, *Duenas-Alvarez*, *Descamps*, and *Mathis*. In 1996, the Tenth Circuit, in *Spring*, held Texas' burglary of a habitation statute qualified as generic burglary. *United States v. Spring*, 80 F.3d 1450, 1461-62 (10th Cir. 1996), *cert. denied*, 519 U.S. 963 (1996). It reasoned that because the statute only covered vehicles adapted for the overnight accommodation of persons, it fell within this Court's definition of generic burglary as defined in *Taylor*. In reaching its conclusion, the Tenth Circuit relied entirely on two cases: *United States v. Silva*, 957 F.2d 157 (5th Cir. 1992), *cert. denied*, 506 U.S. 887 (1992), and *United States v. Sweeten*, 933 F.2d 765 (9th Cir. 1991). *Sweeten* and *Silva* are no longer good law. *Sweeten* was overruled by *Grisel*, 488 F.3d 844, and *Silva* was overruled by *Herrold*, 883 F.3d 517. *Spring* is now an outlier without support.[2]

The Seventh Circuit recently held that mobile homes and trailers in which "owners or occupants actually reside or . . . intend within a reasonable period of time to reside" are "structures" within this Court's definition. *Smith v. United States*, 877 F.3d 720 (7th Cir. 2017) (*citing* 720 ILCS 5/2-6), *petitions for cert. filed* Jan. 23, 2018 (No. 17-7517) and March 20, 2018 (No. 17-8160). To reach its conclusion, the panel in *Smith* relied entirely on *Spring*,

2. The Tenth Circuit has called the validity of *Spring* into question. *See United States v. Robinson*, 720 F. App'x 946, 953-55 (10th Cir. 2018), *petition for cert. filed* Apr. 9, 2018 (No. 17-8457), (Holmes, J., concurring) (*Spring* has been abrogated by *Shepard* and has "not [been] cited in either precedential or persuasive authority in defining the scope of generic burglary" since.).

80 F.3d 1450, and Judge Sutton's dissent in this case. As discussed above, *Spring* is no longer good law. The *Smith* court rationalized its decision by remarking, "it is unlikely that the Justices set out in *Taylor* to adopt a definition of generic burglary that is satisfied by no more than a handful of states – if by any." *Smith*, 877 F.3d at 724. This rationalization relies on the faulty premise that if the Court constructs a definition of generic burglary to include nonpermanent or mobile structures that are adapted for overnight accommodations, the majority of states' burglary statutes would be included. This is incorrect.

V. State criminal codes at the time of *Taylor* do not support the government's position. A closer analysis of state burglary statutes undermines the government's argument.

The government argues that *Taylor*'s definition of generic burglary must have meant to include nonpermanent or mobile structures that are adapted or used for overnight accommodation because the majority of states "had at least one burglary statute that protected nonpermanent or mobile structures." Br. for Pet., p. 18. The government's argument is flawed. "If its approach were correct, it would make no sense to draw the line at vehicles-*cum*-dwellings – the tallying would require some larger subcategory of vehicles to count as viable locations for generic burglary." *Herrold*, 883 F.3d at 541.

At the time *Taylor* was decided, the government cites 19 states as having burglary statutes that covered nonpermanent or mobile structures "irrespective of their purpose." Br. for Pet., App. B, pp. 21a-38a. As an example, Idaho's burglary statute provided, "Every

person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, closed vehicle, closed trailer, airplane or railroad car, with the intent to commit any theft or any felony, is guilty of burglary." I.C. § 18-1401 (1989). Idaho burglary does not limit burglary to vehicles adapted for overnight accommodations.[3] Idaho, and similar states that provide no limitation to the vehicles included in their burglary statutes, have statutes that sweep broader than generic burglary, even if this Court were to adopt the government's new definition. Thus, those states offer no support for the government's argument that *Taylor* must have meant to include vehicles adapted for overnight accommodation in its definition of generic burglary.

Similarly, the other 25 states the government cites as having burglary statutes "encompassing nonpermanent or mobile structures used for enumerated purposes" are not limited to those adapted for overnight accommodation of persons. Br. for Pet., App. B, pp. 21a-38a. Many include vehicles or moveable enclosures that have some other purpose like carrying on a business,[4] business

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3. In 1997, Idaho changed the portion of its burglary statute from "closed vehicle, closed trailer" to just "vehicle, trailer." "The amendment [ ] clarify[ies] the Legislature's intent to allow prosecution for burglary of a vehicle or trailer without the additional evidentiary requirement of proof of the vehicle or trailer's temporary, alterable condition at the time of entry, such as whether the window was up or down at the time of reaching into the vehicle." CRIMES AND PUNISHMENTS—BURGLARY—VEHICLE OR TRAILER, 1997 Idaho Law Ch. 87 (H.B. 97).

4. Alabama, Alaska, Arkansas, Colorado, Iowa, Missouri, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Pennsylvania, Utah, Washington

transportation,[5] where people assemble for the purposes of business,[6] or are used to store, transport, or sell goods or merchandise.[7] For example, the Eighth Circuit sitting en banc held Missouri's second-degree burglary statute is broader than generic burglary because the statute was indivisible and the definition of inhabitable structure was overbroad. *United States v. Naylor*, 887 F.3d 397, 400, 406-07 (8th Cir. 2018) (en banc). Missouri defined inhabitable structure as:

> a ship, trailer, sleeping car, airplane, or other vehicle or structure:
>
> (a) Where any person lives or carries on business or other calling; or
>
> (b) Where people assemble for purposes of business, government, education, religion, entertainment or public transportation; or
>
> (c) Which is used for overnight accommodation of persons. Any such vehicle or structure is "inhabitable" regardless of whether a person is actually present . . .

Naylor, 887 F.3d at 401 (citing Mo. Rev. Stat. § 569.010(2) (1979)).[8]

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5. Arizona

6. Arkansas, Kentucky, Iowa, Missouri, South Carolina

7. Iowa, Mississippi, South Carolina, Washington

8. The current definition of "inhabitable structure" is substantially similar. *See Naylor*, 887 F.3d at 401, fn 3 (citing Mo. Rev. Stat. § 556.061(30) (2017)).

In reality, very few statutes would be included in the government's expanded definition of generic burglary. *See Herrold*, 883 F.3d at 541, fn, 139 ("By our count, well over thirty states included some kind of vehicles outside just mobile dwellings and habitations in their burglary statutes. Far fewer states – only around seven – drew the line to include only those vehicles that could plausibly be called dwellings or mobile habitations.").[9] Using the categorical approach, the overwhelming majority of state burglary statutes will sweep more broadly than generic burglary even if this Court adopts the government's new definition. Many state statutes are structured similar to Missouri with an overbroad definitional section.

Another example is Iowa's overly broad statute, which this Court recently addressed in *Mathis*. 136 S. Ct. 2243. Iowa prohibits the unlawful entry into an "occupied structure." *See* I.C.A. §§ 713.1 – 713.6. Occupied structure is defined as "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of

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9. Even the government cannot agree on how many states will be affected. *Compare* Br. for Pet., p. 18 (suggesting 44 jurisdictions protect nonpermanent or mobile structures), *with* Pet. Reply to BIO, p. 7, fn. 3 (arguing 20 states have applicable statutes). Mr. Stitt disagrees with both of the government's proposed numbers. For example, the government includes South Carolina in the list of 20 states that will be directly affected if this Court adopts its proposed definition. However, South Carolina's definition of dwelling includes "erections which are within 200 yards of [a dwelling house] and are appurtenant to it." S.C. Code § 16-11-10 (2018). This likely makes South Carolina's burglary of a dwelling overbroad regardless of whether this Court adopts the government's new definition.

person, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." I.C.A. § 702.12. The listed locations in the occupied structure definitional statute "are not alternative elements, going to the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying a single locational element." *Mathis*, 136 S. Ct. at 2250. Thus, the type of "occupied structure" is a factual finding that cannot be considered by the sentencing court for ACCA enhancement purposes. Because "occupied structure" includes more than just "buildings or structures" or moveable structures that are adapted for overnight accommodations, Iowa's burglary statute is broader than generic burglary even using the government's new definition.

A closer analysis of state burglary statutes undermines the government's argument that *Taylor* must have meant to include vehicles that have been adapted for overnight accommodations in its definition. A majority of states' burglary statutes do not limit the inclusion of vehicles and moveable structures to only those locations adapted for the overnight accommodations of persons. *See Herrold*, 883 F.3d at 541, fn, 139.

VI. This Court should not expand the definition of generic burglary to compensate for the unconstitutionally vague residual clause.

Congress drafted the ACCA in an unconstitutional way. *See Johnson v. United States*, 135 S. Ct. 2551 (2015) (striking the ACCA residual clause as unconstitutionally vague). This Court should decline to expand the definition of generic burglary beyond what Congress intended it to be in an effort to compensate for the voided residual clause.

Some state burglary statutes only qualified as violent felonies under the ACCA's residual clause. *See, e.g., United States v. Moncrief*, 356 F. App'x 11 (9th Cir. 2009) (finding Tennessee's aggravated burglary statute nongeneric but a violent felony under the ACCA's residual clause). Without the residual clause, fewer burglary statutes will qualify as violent felonies under the ACCA. This is a problem for Congress to fix.

Throughout the years, this Court has raised concerns about the narrowing of the ACCA and has "suggested to Congress that it reconsider how the ACCA is written." *Mathis*, 136 S. Ct. at 2257 (citing *Chambers v. United States*, 555 U.S. 122, 133 (2009) (Alito, J., concurring in judgment); *see Descamps v. United States*, 570 U.S. 254, 278-89 (2013) (Kennedy, J., concurring)). Notably, Congress is aware of decisions narrowing the application of the ACCA. In 2010, Senator Arlen Spector recognized "a series of Supreme Court rulings" have "restricted when and how the Act is applied" and introduced Senate Bill 4045 "to clarify and strengthen the armed career criminal provisions." 156 CONG. REC. S10514-04, S10516-17, 2010 WL 5135528, 111th Cong., 2nd Sess. (Dec. 17, 2010).

The solution to the ACCA, Senator Spector concluded, "is simple." 156 CONG. REC. S10514-04, S10517, 2010 WL 5135528, 111th Cong., 2nd Sess. (Dec. 17, 2010). Senate Bill 4045 proposed "lowering the maximum sentence under the section 924(e) from life to 25 years, and increasing the maximum sentence under section 922(g) from 10 years to 25 years." 156 CONG. REC. S10514-04, S10517, 2010 WL 5135528, 111th Cong., 2nd Sess. (Dec. 17, 2010). This would avoid any implication of *Apprendi v. New Jersey*, 530 U.S. at 466 (2000), and give the federal sentencing courts full

discretion at sentencing. Senate Bill 4045 never passed the Senate.[10]

This Court should not "introduce inconsistency and arbitrariness" by redefining burglary from what federal courts have understood it to mean for nearly 30 years. *See Mathis*, 136 S. Ct. at 2257. This Court has repeatedly held vehicles are not "buildings" or "structures" within the generic meaning and has never distinguished vehicles that were adapted for overnight accommodation. *See Mathis*, 136 S. Ct. 2243; *United States v. Stitt*, 860 F.3d 854, 858 (6th Cir. 2017) (en banc). "Coherence has a claim on the law." *Mathis*, 136 S. Ct. at 2257.

VII. The policy of stare decisis weighs heavily in support of maintaining *Taylor*'s well-understood definition.

The doctrine of stare decisis is an important staple in American jurisprudence. It "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 287 (1991). Arguments in support of stare decisis are particularly strong when this Court has interpreted a criminal statute. *Shepard*, 544 U.S. at 23 (2005) (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989)) ("Considerations of stare decisis have special force in the area of statutory

10. On August 1, 2018, Senators Orrin Hatch and Tom Cotton introduced The Restoring the Armed Career Criminal Act of 2018. Additionally, in August 2018, United States Attorney General Jeff Sessions made a public call to Congress to amend the ACCA.

interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

Consistency in statutory interpretation is necessary to eliminate ambiguity, arbitrary enforcement, and to provide defendants the kind of notice that is required by the due process clause of the Fifth Amendment. Nearly every federal court has understood this Court's interpretation of generic burglary to exclude vehicles. This precedential force is enhanced with "nearly [30] years having passed since *Taylor* came down, without any action by Congress to modify the statute as subject to [this Court's] understanding . . . ." *Shepard*, 544 U.S. at 23. While Congress sought multiple times to add the missing definition of burglary back into the ACCA, every proposed definition covered only buildings. In the 34 years since the enactment of the ACCA, Congress has never once proposed extending the burglary definition to vehicles adapted for overnight accommodations of persons.

The government has also historically understood *Taylor* to exclude vehicles. Prior to *Mathis*, the government conceded vehicles were not included in this Court's definition of generic burglary. The government appears to have changed course only after this Court limited the scope of the ACCA in *Johnson* (2015) and *Mathis*. The government's new position undercuts its argument that *Taylor* must have meant to include mobile structures all along. Moreover, the government's new definition only adds confusion where there was previously none.

Adopting the government's definition would create confusion and ambiguity. The government has offered no definition of "adapted for overnight accommodations." It

is unclear what law would drive this definition. Mr. Stitt has been unable to find any consensus on such a definition. *Compare United States v. Sparks*, 265 F.3d 825, 834 (9th Cir. 2001), *overruled by Grisel*, 488 F.3d 844 (only vehicles that have "either undergone a fundamental alteration, or [was] originally [ ] designed as a home" qualify), *with California v. Fleetwood*, 171 Cal. App. 3d 982, 987 (Ct. App. 1985) (requiring only that "a person with possessory rights use[] the place as sleeping quarters intending to continue doing so in the future."). "[W]hat makes [a vehicle] suitable or not suitable for overnight accommodation is a subjective factual question for the jury's determination." *Price v. Texas*, No. 08-01-00073-CR, 2002 WL 471343, at *3 (Tex. App. Mar. 28, 2002).

With no clear definition of adapted for overnight accommodation, the government's proposed definition is ambiguous and raises due process concerns. The Fifth Amendment to the United States Constitution guarantees a criminal defendant due process of law before he is deprived of life, liberty, or property. U.S. CONST. amend. V. The government "violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. This Court should not add more arbitrariness into the ACCA by adopting the government's definition.

For almost 30 years, this Court has defined generic burglary under the ACCA to exclude vehicles. Congress has made no attempt to broaden this definition. The doctrine of stare decisis is particularly strong in this case and this Court should decline to abandon its decades-old

interpretation of the statute because doing so will only create confusion and ambiguity.

VIII. Even if the Court applies the government's novel interpretation of "building or structure" to include vehicles modified for overnight accommodations, Tennessee's burglary statute is still overbroad and, therefore, cannot fit within the definition of "generic burglary."

Tennessee's definition of habitation is still overbroad even if this Court were to adopt the government's new definition of generic burglary. Tennessee aggravated burglary is burglary of a "habitation." Tenn. Code Ann. § 39-14-403. Tenn. Code Ann. § 39-14-401(1) defines habitation by listing various means by which a person may satisfy the element of habitation. *See Stitt*, 860 F.3d at 862 (the parties, and the majority of the Sixth Circuit, agree that the definition of habitation "lays out alternative means to fulfilling a single element rather than alternative elements). Because Tenn. Code Ann. § 39-14-401(1) lists means and not elements, the modified categorical approach does not apply. *See Descamps*, 570 U.S. at 258.

Applying the categorical approach, Tennessee's "habitation" is broader than building, structure, or nonpermanent or mobile structure adapted for overnight accommodation of persons. Habitation:

> (A) Means any structure, including buildings, module units, mobile homes, trailers, and tents, which is designed or adapted for the overnight accommodation of persons;

> (B) Includes a self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant; **and**
>
> (C) Includes each separately secured or occupied portion of the structure or vehicle and each structure appurtenant to or connected with the structure or vehicle[.]

Tenn. Code Ann. § 39-14-401(1) (emphasis added). Subsection (C) includes places that are appurtenant to or connected with a structure or vehicle. "[A]ppurtenant to' can mean that an object is physically attached to another object, but it can also imply a relationship between two objects." *United States v. Lara*, 590 F.App'x 574, 579 (6th Cir. 2014). "An appurtenance is defined as "[s]omething that belongs or is attached to something else." *State v. Thompson*, No. M201400596CCAR3CD, 2015 WL 1756448, at *6 (Tenn. Crim. App. Apr. 15, 2015) (quoting Black's Law Dictionary (9th ed.2009)).

In *Thompson*, the Tennessee court held that an RV attached to the defendant's home by an electrical cord was "appurtenant to" the defendant's residence despite being parked on the neighbor's property. *Id.* Following the logic from *Thompson*, an electric vehicle that is plugged into any building's electrical outlet would be "appurtenant to" that building and meet the habitation definition under Tenn. Code Ann. § 39-14-401(1)(C) regardless of whether the vehicle was designed or adapted for overnight accommodations.

Tennessee's broad definition of the element of habitation makes Tennessee's aggravated burglary statute overbroad even if this Court were to break from its own precedent and adopt the government's new definition of generic burglary.

IX. Alternatively, this Court should hold the ACCA's sentencing structure violates Mr. Stitt's Sixth Amendment rights.

A defendant's Sixth Amendment rights are violated when a judge makes a finding of fact that increases the penalty for a crime beyond the prescribed statutory maximum. *See Apprendi*, 530 U.S. at 489. Long ago, this Court carved out an exception for proof of prior convictions. *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). Although this Court has raised concerns that *Almendarez-Torres* was incorrectly decided and should be revisited, it has not yet done so. *See Apprendi*, 530 U.S. at 489; *see Shepard*, 544 U.S. at 27 (Thomas, J. concurring) ("a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided.").

Justice Thomas has suggested that "this Court should consider *Almendarez-Torres*' continued viability" in the appropriate case because "[i]nnumerable criminal defendants have been unconstitutionally sentenced under the flawed rule of *Almendarez-Torres*." *Shepard*, 544 U.S. at 28. Stitt presents such an appropriate case. The current sentencing structure of the ACCA is irreconcilable with Mr. Stitt's Sixth Amendment rights. This Court should take the opportunity to overrule *Almendarez-Torres* and hold the sentencing structure of the ACCA is unconstitutional.

CONCLUSION

For the foregoing reasons, the Sixth Circuit Court of Appeal en banc opinion should be affirmed.

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Nos. 17-765 and 17-766

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

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UNITED STATES OF AMERICA, PETITIONER

v.

JASON DANIEL SIMS

ON WRITS OF CERTIORARI
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REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondents, like the courts below, embrace a definition of "burglary" that would all but erase the term from the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e)(2)(B)(ii). As this Court explained in *Taylor* v. *United States*, 495 U.S. 575 (1990), when Congress adopted the current version of the ACCA in 1986, it "meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598. Respondents do not dispute that, at that time, "most States" had at least one burglary statute protecting the type of mobile or nonpermanent homes

at issue here. Yet they press an interpretation of "burglary" that would exclude laws designed to protect all dwellings equally and that would leave most States without *any* offense that constitutes "burglary" under the ACCA. See pp. 4-8 & nn.1-3, *infra*.

Respondents' attempts to justify such a dramatic diminution of generic burglary largely repeat the errors of the courts below. Respondents counterintuitively contend that because some state burglary statutes in 1986 were even *broader* than the ones at issue here, this Court should ignore that nearly every State in 1986 criminalized the home invasions that the state statutes at issue in these cases proscribe. And respondents erroneously suggest that this Court has already decided the question presented by stating that statutes covering all vehicles do not constitute generic burglary—even though the Court has never considered the narrower class of structures covered by the Tennessee and Arkansas provisions.

None of respondents' arguments on the question presented supports excising home-invasion offenses—the "heart of the crime" of burglary, *Stitt* Pet. App. 51a (Sutton, J., dissenting)—from the definition of "burglary" under the ACCA. Nor do respondents provide any sound reason for the Court to venture beyond the question presented to affirm the decisions below based on alternative and unavailing state-law and constitutional claims that those decisions did not address. Instead, the decisions below should be reversed and the cases should be remanded for further proceedings consistent with a proper interpretation of the important and recurring ACCA predicate of "burglary."

A. *Taylor*'s Definition Of Generic "Burglary" Encompasses The Invasion Of Nonpermanent Or Mobile Dwellings

In *Taylor*, this Court held that "burglary" under the ACCA includes "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." 495 U.S. at 599. As the government has explained (Br. 17-31), each of the considerations on which *Taylor* relied to derive that definition demonstrates that burglary of a structure includes burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation.

1. Most States have treated invasion of a mobile or nonpermanent dwelling as burglary

Taylor's definition was designed to capture what "Congress meant by 'burglary'"—namely, "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. Neither respondent disputes that when Congress enacted the current version of the ACCA in 1986, "the criminal codes of most States"—43 of them, plus the District of Columbia—included at least one burglary statute that protected nonpermanent or mobile structures, such as vehicles, boats, and tents, adapted or used as dwellings. Gov't Br. 18 & App. B; *Stitt* Br. 24-28; *Sims* Br. 21-22; see Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, Tit. I, Subtit. I, § 1402, 100 Stat. 3207-39. Respondents cannot square that legal regime with their own cramped view of generic burglary, and their attempts to minimize or disregard it are unsound.

a. Relying on *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017), Sims contends that "a multijuris-

dictional analysis 'is not required by the categorical approach.'" *Sims* Br. 21 (quoting *Esquivel-Quintana*, 137 S. Ct. at 1571 n.3). But even in *Esquivel-Quintana*, this Court recognized that a multijurisdictional analysis is "useful insofar as it helps shed light on the common understanding and meaning of the federal provision being interpreted," 137 S. Ct. 1571 n.3 (citations and internal quotation marks omitted), and the Court relied on such an analysis to determine the meaning of the phrase "sexual abuse of a minor" in 8 U.S.C. 1101(a)(43)(A), see 137 S. Ct. 1570-1572. And such an analysis is inescapably relevant in the particular context of ACCA burglary, because *Taylor* defined "'burglary'" by reference to "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598.

b. Respondents next point out (*Stitt* Br. 24-28; *Sims* Br. 21) that in 1986, some state burglary statutes were not limited to nonpermanent or mobile structures adapted or used as dwellings, but also included other structures (*e.g.*, vehicles used for other purposes). But the existence of even *broader* statutes would be an anomalous reason for *narrowing* generic burglary to exclude common ground. Even if such statutes might themselves sweep more broadly than generic burglary in certain respects, cf., *e.g.*, Gov't Br. at 44, *Mathis* v. *United States*, 136 S. Ct. 2243 (2016) (No. 15-6092) (acknowledging that burglary statute covering, *inter alia*, vehicles used for storage was not generic), they underscore that the "criminal codes of most States," *Taylor*, 495 U.S. at 598, at least covered the nonpermanent or mobile structures at issue here.

The definition of burglary has always focused on the protection of "dwellings," and burglary statutes that equally protect residences of all stripes are the modern-

day translation of the crime's common-law "core," *Taylor*, 495 U.S. at 592-593. See Gov't Br. 27-29; *Stitt* Pet. App. 53a-54a (Sutton, J., dissenting). By 1986, at least 21 jurisdictions (20 States and the District of Columbia) had enacted dwelling-focused burglary statutes that included (either explicitly or by reasonable inference) the categories of structures at issue here—nonpermanent or mobile structures that are adapted or used for overnight accommodation—but did not extend to such structures if adapted or used for other purposes.[1] Thus, al-

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[1] See Ala. Code § 13A-7-1(3) (Supp. 1983) (defining "dwelling") (capitalization omitted); *id.* § 13A-7-5 (1982) (first-degree burglary of a "dwelling"); Alaska Stat. § 11.46.300(1) (1983) (first-degree burglary of a "dwelling"); *id.* § 11.81.900(b)(17) (Supp. 1985) (defining "dwelling"); Conn. Gen. Stat. Ann. § 53a-100(2) (West Supp. 1985) (defining "dwelling"); *id.* § 53a-102 (West 1972) (second-degree burglary of a "dwelling"); *id.* § 53a-102a (West Supp. 1985) (second-degree burglary of a dwelling with a firearm); Del. Code Ann. tit. 11, § 825(1) (1979) (second-degree burglary of a "dwelling"); *id.* § 826 (first-degree burglary of a "dwelling"); *id.* § 829(b) (defining "[d]welling"); D.C. Code Ann. § 22-1801(a) (1973) (first-degree burglary of a "dwelling"); Ga. Code Ann. § 16-7-1(a) (Michie 1984) (burglary of "any building, vehicle, railroad car, watercraft, or other such structure designed for use as the dwelling of another"); Haw. Rev. Stat. § 708-800(1) and (6) (1985) (defining "[b]uilding" and "[d]welling"); *id.* § 708-810(1)(c) (first-degree burglary of a "dwelling"); *id.* § 708-811(1) (second-degree burglary of a "building"); Ill. Rev. Stat. ch. 38, para. 2-6 (1983) (defining "[d]welling"); *id.* para. 19-3(a) (residential burglary of the "dwelling place of another"); Ind. Code Ann. § 35-43-2-1 (Burns Supp. 1984) (Class B burglary of a "dwelling"); Ky. Rev. Stat. Ann. § 511.010(1) and (2) (Michie 1985) (defining "[b]uilding" and "[d]welling"); *id.* § 511.030 (second-degree burglary of a "dwelling"); La. Rev. Stat. Ann. § 14:62.2 (West 1986) (simple burglary of an inhabited "dwelling, house, apartment or other structure used in whole or in part as a home or place of abode by a person or persons"); Me. Rev. Stat. Ann. tit. 17-A, § 2(10) and (24) (West 1983) (defining "[d]welling

though respondents' cramped definition of generic burglary would include the burglary offenses of only

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place" and "[s]tructure"); *id.* § 401(2)(B) (class B burglary of a "structure which is a dwelling place"); Minn. Stat. § 609.581(2) and (3) (1986) (defining "[b]uilding" and "[d]welling"); *id.* § 609.582(1)(a) (first-degree burglary of an occupied "dwelling"); *id.* § 609.582(2)(a) (second-degree burglary of a "dwelling"); N.H. Rev. Stat. Ann. § 635:1(I)-(II) (1986) (Class A burglary of a "dwelling"); N.Y. Penal Law § 140.00(2) and (3) (McKinney Supp. 1986) (defining "[b]uilding" and "[d]welling"); *id.* § 140.25(2) (McKinney Supp. 1983) (second-degree burglary of a "dwelling"); *id.* § 140.30 (McKinney 1975 & Supp. 1983) (first-degree burglary of a "dwelling"); N.D. Cent. Code § 12.22-02(2)(a) (1985) (Class B burglary of a "dwelling"); Or. Rev. Stat. § 164.205(1) and (2) (1983) (defining "[b]uilding" and "[d]welling"); *id.* § 164.225(1) (first-degree burglary of a "dwelling"); S.C. Code Ann. § 16-11-10 (Law. Co-op. 1977) (defining "dwelling house"); *id.* § 16-11-310(1) and (2) (Law. Co-op. Supp. 1985) (defining "[b]uilding" and "[d]welling"); *id.* § 16-11-311 (first-degree burglary of a "dwelling"); *id.* § 16-11-312(A) (second-degree burglary of a "dwelling"); Utah Code Ann. § 76-6-201(1) and (2) (1978) (defining "[b]uilding" and "[d]welling"); *id.* § 76-6-202(2) (second-degree burglary of a "dwelling"); W. Va. Code Ann. § 61-3-11(a)-(b) (Michie 1977) (burglary of a "dwelling house"); *id.* § 61-3-11(c) (defining "dwelling house"); Wis. Stat. § 340.01(33m) (1985-1986) (defining "[m]otor home"); Wis. Stat. Ann. § 943.10(1)(e) (West 1982) (burglary of a "motor home or other motorized type of home or a trailer home"). This tally is underinclusive insofar as it omits statutes that courts have suggested do not constitute generic burglary for the reason that they are not divisible or for another reason unrelated to the locational element.

Amicus the National Association of Criminal Defense Lawyers contends (Br. 5) that in 1984 and 1986, "the majority of states' burglary statutes distinguished, in one way or another, between structures, such as buildings, on the one hand, and temporary spaces or mobile vehicles—even if habitable—such as RVs, boats, or railroad cars, on the other hand." But even if some of the state burglary statutes cited above identified mobile or nonpermanent dwellings as a particular subcategory of buildings or structures, they all prohibited the invasion of such dwellings.

12 States at that time,[2] a definition that also encompassed such residential-burglary crimes would include at least one burglary statute in 31 jurisdictions, as well as an additional burglary statute in two States (Georgia and Wisconsin). A definition of "burglary" that includes the types of structures at issue here would therefore reflect "the criminal codes of most States," *Taylor*, 495 U.S. at 598. Respondents' definition alone, however, would flout that description. See *United States* v. *Castleman*, 572 U.S. 157, 167 (2014) (rejecting reading of 18 U.S.C. 922(g)(9) that "would have rendered [it] inoperative in many States at the time of its enactment"); *Taylor*, 495 U.S. at 594 (declining to adopt the common-law definition of burglary because it

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[2] Ga. Code Ann. § 16-7-1(a) (Michie 1984) (burglary of "the dwelling house of another"); Md. Ann. Code art. 27, § 30 (1982) (breaking and entering of a "dwelling house" at night); *id.* § 34 (burglary of a "building" with explosives); Mass. Gen. L. ch. 266, § 1 (1986) (defining "dwelling house"); *id.* § 14 (armed burglary of an occupied "dwelling house"); *id.* § 15 (unarmed burglary of a "dwelling house"); Mich. Comp. Laws § 750.110 (1981) (breaking and entering an "occupied dwelling house"); Miss. Code Ann. § 97-17-19 (1973) (burglary of a "dwelling house"); *id.* § 97-17-21 (burglary of an inhabited "dwelling house"); *id.* § 97-17-23 (armed burglary of an inhabited "dwelling house"); *id.* § 97-17-31 (defining "dwelling house"); N.M. Stat. Ann. § 30-16-3(A) (Michie 1978) (third-degree burglary of a "dwelling house"); N.C. Gen. Stat. § 14-51 (1986) (codifying common-law burglary); Okla. Stat. Ann. tit. 21, § 1431 (West 1983) (first-degree burglary of a "dwelling house"); *id.* § 1439 (defining "dwelling house"); R.I. Gen. Laws § 11-8-1 (1981) (codifying common-law burglary); Tenn. Code Ann. §§ 39-3-401, 39-3-403 (1982) (burglary and second-degree burglary of a "dwelling house, or any other house, building, room or rooms therein used and occupied by any person or persons as a dwelling place or lodging"); Va. Code Ann. § 18.2-89 (Michie 1982) (burglary of a "dwelling house"); Wis. Stat. Ann. § 943.10(1)(a) (West 1982) (burglary of a "building or dwelling").

"would come close to nullifying that term's effect in the [ACCA]").[3]

2. Secondary sources confirm that ACCA burglary covers nonpermanent or mobile dwellings

As the government has explained (Br. 20-24), the secondary sources on which *Taylor* relied reinforce that the locational element of ACCA burglary encompasses nonpermanent or mobile structures adapted or used for overnight accommodation. Respondents' arguments to the contrary (*Stitt* Br. 14-16; *Sims* Br. 19-21) lack merit.

a. *Taylor* made clear that its definition of "burglary" in the ACCA "approximate[d]" the Model Penal Code's. 495 U.S. at 598 n.8; see Gov't Br. 20-22. Since 1980, the Model Penal Code has described burglary to include the unlawful entry into "a building or occupied structure, or separately secured or occupied portion thereof, with purpose to commit a crime therein." Model Penal Code § 221.1(1) (1980). And since that time, the Model Penal Code has further defined "occupied structure" to mean "any structure, vehicle or place adapted for overnight accommodation of persons, or for carrying on business therein, whether or not a person is actually present." *Id.* § 221.0(1). The Model Penal Code's definition of burglary thus expressly encompasses the nonpermanent or mobile dwellings at issue here.

Stitt's observation (Br. 14) that the Code's definition would encompass burglary offenses even broader than those at issue in these cases again provides no meaningful support for his efforts to *narrow* the definition of ACCA burglary. And Sims's attempt to effectively disregard the Model Penal Code definition, on the ground

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[3] The numbers for current-day statutes are similar. See *Stitt* Cert. Reply Br. 7-9.

that the Court in *Taylor* used the word "approximates" to describe its relationship to the ACCA definition, see *Sims* Br. 21 (citation omitted), gives short shrift to the language and analysis in *Taylor*, see, *e.g.*, *Webster's Third New International Dictionary* 107 (1986) (*Webster's Third*) (defining "approximate" as "to come near to"). Moreover, *Taylor* is far from the only case in which this Court has looked to the Model Penal Code in determining the "generic" meaning of a particular offense for purposes of interpreting federal law. See, *e.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1571; *Scheidler* v. *National Org. for Women, Inc.*, 537 U.S. 393, 410 (2003).

b. *Taylor*'s reference to 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* (1986) (LaFave); see 495 U.S. at 598, likewise supports a definition of "burglary" that includes burglary of a nonpermanent or mobile dwelling. As the government has explained (Br. 22-24), LaFave recognized that contemporary burglary statutes "typically describe the place [that is burglarized] as a 'building' or 'structure,' and these terms are often broadly construed." § 8.13(c), at 471 (footnotes omitted).

Sims errs in reading (Br. 20-21) the LaFave treatise to nevertheless support a crabbed construction of the word "structure." Contrary to Sims's contention, LaFave's statement that some jurisdictions had extended their "burglary statutes * * * to still other places, such as all or some types of vehicles," § 8.13(c), at 471 (footnote omitted), does not suggest—much less "clearly explain[]"—that LaFave viewed "any statute covering even 'some types of vehicles'" as atypical,

Sims Br. 20 (citation omitted).[4] The treatise in fact indicates otherwise. It states that covering vehicles "may make sense in some circumstances, *as where the vehicle is a motor home*." LaFave § 8.13(c) n.85, at 472 (emphasis added); see *ibid.* (citing with approval Wis. Stat. Ann. § 943.10 (West 1982), which covered, *inter alia*, "[a] motor home or other motorized type of home or a trailer home"). And 12 of the 13 state statutes that LaFave described as "typical[]," § 8.13(c) & nn.81-82, at 471, covered the types of nonpermanent or mobile structures at issue here, Gov't Br. 22-23. Sims suggests (Br. 20) that "LaFave (or, more likely, his research assistant) simply collected" those statutes without reading them (or the corresponding definitional provisions). But the far better view is that—consistent with the substantial majority of state legislatures—LaFave meant to illustrate that invasion of nonpermanent or mobile structures adapted or used for overnight accommodation is "burglary."

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[4] Respondents' focus (*Stitt* Br. 15; *Sims* Br. 20-21) on LaFave's citation of Tex. Penal Code Ann. § 30.01 (West 1974), as an example of a state statute that covered "vehicle[s]" rather than "structure[s]," is misplaced. Section 30.01 was (and remains) a definitional provision that defines, *inter alia*, the terms "[h]abitation" and "[v]ehicle" used in the different burglary provisions. *Id.* § 30.01 (West Supp. 2017); *id.* § 30.01 (West 1974). As the government has explained (Br. 35 n.2), the best reading of LaFave's citation to Section 30.01 is that the treatise meant simply to highlight the express coverage of *all* "vehicle[s]" for purposes of one particular version of burglary, Tex. Penal Code Ann. § 30.04 (West 1974). Indeed, the definition of vehicles in the Texas statute expressly *excludes* vehicles adapted for overnight accommodation. See *id.* § 30.01(3). Vehicles that are so adapted are classified as "[h]abitation[s]" and treated like other "structure[s]" adapted for that purpose. See *id.* § 30.01(1).

3. The ACCA's design does not suggest any distinction between the invasions of different types of homes

Taylor observed that when Congress enacted the ACCA, it was particularly focused on burglary because of the crime's "inherent potential for harm to persons," 495 U.S. at 588, especially in the context of home invasions, see *id.* at 581, 585. As the government has explained (Br. 24-27), and as the vast majority of States recognized by 1986, see pp. 4-8 & nn.1-2, *supra*, home invasion is in no way a less significant crime when the home is nonpermanent or can be moved, see *United States* v. *Rivera-Oros*, 590 F.3d 1123, 1130 (10th Cir. 2009) ("[T]he unique wounds caused by residential burglary are independent of the size or construction of the dwelling. They are the same for the mansion house and the boarding house, the tract home and the mobile home."). Respondents' efforts to introduce such a distinction into the ACCA's definition of "burglary" are accordingly misconceived.

Stitt simply asserts (Br. 12) that *Taylor*'s locational element "categorically excludes vehicles." See *Stitt* Br. 16, 23-24. But he identifies no sound reason why Congress would have wanted to treat two otherwise-identical structures differently solely because one has wheels. Consider the two homes depicted below:

Stitt would attribute to Congress the view that invasion of the home on the left is "burglary," but invasion of the home on the right is not. But neither the risk of harm to inhabitants nor the culpability of the intruder would be different in either case.

Tellingly, Sims does not endorse Stitt's dividing line. Sims instead acknowledges that "[t]he government may be right that invading a mobile home carries a 'level of seriousness[]' comparable to invading a single-family home." *Sims* Br. 22 (citations omitted); see *id.* at 23-24. But, he contends (Br. 23), "vehicles such as RV's, campers, and boats with sleeping quarters present very different circumstances," because while they "are adapted for overnight accommodation, they typically sit empty in driveways, parking lots, and marinas." He thus proposes a test under which "a 'vehicle' is a distinct category of location from a 'building' or 'structure,' *at least when the vehicle is designed for only occasional overnight use.*" *Sims* Br. 9 (emphasis added).

That highly stylized rule is seriously flawed. As a threshold matter, it appears to rest largely on Sims's own subjective assessment of the risk of violence inherent in the burglary of particular types of structures. But as Stitt emphasizes (Br. 12), this Court in *Taylor* rejected an approach that would differentiate between burglary offenses on that ground. See 495 U.S. at 596-597.[5] Furthermore, even if *Taylor* could be read to

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[5] Stitt errs in suggesting (Br. 12) that the government itself "urges this Court to redefine burglary based on the risk of harm." See also Nat'l Ass'n of Fed. Defenders Amicus Br. 5-7. That suggestion misunderstands the government's point, which is simply that Congress's concern with burglary's "inherent potential for harm to persons," *Taylor*, 495 U.S. at 588, applies with full force to

countenance such risk-based divisions, it could not be read to countenance an approach that assesses risk based on the likelihood of occupancy. The Court in *Taylor* rejected a definition of burglary limited to, *inter alia*, "aggravated-burglary statutes having elements such as entering an occupied building." *Id.* at 596. The Court thus did not attribute to Congress any intent to distinguish between burglary offenses based on occupancy. Even if an RV is infrequently occupied, the same could be said of an abandoned warehouse, a vacation home, or the least desirable room in a remotely located motel. Yet invasion of any of those locations would indisputably constitute generic burglary.

Sims correctly notes (Br. 23) that some "relatively humble" boats and vehicles may "have sleeping quarters." But the invasion of a structure with "sleeping quarters," *ibid.*, is the same crime irrespective of what type of structure the owner has the "financial means to afford," *Collins* v. *Virginia*, 138 S. Ct. 1663, 1675 (2018); see *Stitt* Pet. App. 54a (Sutton, J., dissenting). Indeed, if Sims were correct in his view that the relative dangerousness of an intrusion is key, then the more modest the dwelling, the ***stronger*** the argument that its invasion should constitute generic burglary. The unauthorized entry of RVs, campers, and small boats that are used or adapted for overnight accommodation "pose[s] a greater risk of violence to the occupant or owner than the burglary of a building or house because it is more difficult for the burglar to enter or escape unnoticed." *United States* v. *Spring*, 80 F.3d 1450, 1462 (10th Cir.), cert. denied, 519 U.S. 963 (1996).

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the burglary offenses that respondents would exclude from the statutory definition.

4. Respondents' reliance on stare decisis is misplaced

Respondents' contention (*Stitt* Br. 8-9, 16-19, 31-33; *Sims* Br. 9-10) that this Court has already decided the question presented in their favor is insupportable.

First, respondents err insofar as they suggest that *Taylor* limited ACCA burglary to the burglary of buildings. Respondents derive that suggestion (*Stitt* Br. 7-9; *Sims* Br. 10) from the definition of burglary in the 1984 version of the ACCA, which expressly referenced only "building[s]," 18 U.S.C. App. 1202(c)(9), at 107 (Supp. II 1984), and the Court's statement that *Taylor*'s definition of burglary was "practically identical" to the deleted one, 495 U.S. at 598. But at least with respect to the locational element, *Taylor* did not invite guesswork about how the Court would have construed the deleted statutory definition or the degree to which the definition adopted in *Taylor* might not be fully identical. Instead, *Taylor* was explicit that the locational element of burglary under the current version of the ACCA encompasses "building[s] or *other structure[s]*." *Ibid.* (emphasis added). And the Court's post-*Taylor* decisions have reinforced the point. See, *e.g.*, *Mathis* v. *United States*, 136 S. Ct. 2243, 2246 (2016) (reciting *Taylor*'s "building or other structure" formulation); *Shepard* v. *United States*, 544 U.S. 13, 15-16 (2005) (explaining that the ACCA "makes burglary a violent felony only if committed in a building or enclosed space").

As a matter of plain meaning, the word "structure" is capacious enough to include nonpermanent or mobile dwellings. See, *e.g.*, *Webster's Third* 2267 (defining "structure" as "something constructed or built"); see also *Stitt* Pet. App. 50a (Sutton, J., dissenting) ("Bridges, cranes, gazebos, and doll houses are all 'structures.'").

The extensive examples of States defining burglary to include such structures when they are adapted or used for overnight accommodation, see pp. 4-8 & nn.1-3, *supra*, belie Stitt's assertion (Br. 32) that a similar reading of *Taylor* will create confusion or arbitrariness. See Model Penal Code § 221.1 cmt. 3(b) ("The essential notion is apparent potential for regular occupancy.").[6] And to the extent that Stitt's catalog (Br. 16-19) of unsuccessful post-*Taylor* legislative proposals to resurrect the prior statutory definition might have any relevance to this case, see *Bruesewitz* v. *Wyeth LLC*, 562 U.S. 223, 242 (2011) (rejecting reliance on "[p]ost-enactment legislative history"), it demonstrates that Congress itself is satisfied with the *Taylor* formulation.

Second, respondents err in suggesting that this Court has answered the question presented here by stating, in cases presenting different questions, that generic burglary does not include burglary of "vehicles," *Stitt* Br. 12-19, or "automobiles," *Sims* Br. 9 (citation omitted). As the government has explained (Br. 33-36), none of those statements was made in a context in which the Court considered a burglary statute that covered vehicles or automobiles only to the extent they are adapted or used for overnight accommodation. Cf. *United States* v. *Gaudin*, 515 U.S. 506, 522 (1995) (declining to give stare decisis effect to a prior decision that

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[6] Sims invokes (Br. 24-25) the rule of lenity, but it has no application here. That tool of statutory construction "only applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich* v. *Spears*, 570 U.S. 48, 76 (2013) (citation omitted). *Taylor* neither found nor created grievous ambiguity in the definition of ACCA burglary.

did not involve the precise question presented and thus "had no reason to explore" the relevant arguments). Sims nevertheless proposes (Br. 18-19) that this Court treat those statements as if they were on-point holdings by adopting a special ACCA-specific version of stare decisis. But inventing and applying a *sui generis* species of stare decisis would itself subvert the "even-handed[ness]," "predictab[ility]," "consisten[cy]," and "integrity" of judicial decisionmaking that the doctrine is intended to promote. *Kimble* v. *Marvel Ent'mt, LLC*, 135 S. Ct. 2401, 2409 (2015) (citation omitted).

B. Respondents' Alternative Arguments Do Not Warrant Affirmance Of The Judgments Below

In addition to addressing the question presented, each respondent attempts to defend the judgment in his case on alternative grounds. This Court can and should reverse the decisions below without addressing those arguments. This Court has discretion to "consider, or decline to entertain, alternative grounds for affirmance." *United States* v. *Tinklenberg*, 563 U.S. 647, 661 (2011) (citation and internal quotation marks omitted). Respondents' alternative arguments here were not raised in their responses to the petitions for writs of certiorari. And they consist only of unsound state-law arguments and a constitutional claim that this Court has previously rejected.

1. This Court should not affirm either judgment below on state-specific grounds

As the government has explained (Br. 31-33), a correct interpretation of ACCA "burglary" would cover the particular Tennessee and Arkansas residential-burglary offenses at issue in respondents' cases. In contending otherwise (*Stitt* Br. 33-35; *Sims* Br. 25-41),

respondents invite this Court to address "matters that involve the construction of state law," in derogation of the Court's "settled and firm policy of deferring to regional courts of appeals," *Bowen* v. *Massachusetts*, 487 U.S. 879, 908 (1988); see also, *e.g.*, *Elk Grove Unified Sch. Dist.* v. *Newdow*, 542 U.S. 1, 16 (2004). And they do so in circumstances in which the issues were not even addressed in the first instance below. To the extent respondents preserved their alternative arguments in the lower courts, those courts may consider them on remand. In any event, respondents' state-law arguments are meritless.

Stitt contends (Br. 33-35) that even if ACCA burglary encompasses burglary of "a nonpermanent or mobile structure adapted for overnight accommodation of persons," his Tennessee burglary offense still would not qualify, because its locational element includes "each structure appurtenant to or connected with [a covered] structure or vehicle," Tenn. Code Ann. § 39-14-401(1)(C) (Supp. 2001). That contention rests on a misreading of the state statute. In particular, it overlooks that the appurtenant or connected location must itself be a "structure." *Ibid.* And the term "structure" includes only "buildings, module units, mobile homes, trailers, and tents, which [are] designed or adapted for the overnight accommodation of persons." *Id.* § 39-14-401(1)(A).

Sims similarly contends (Br. 25-29) that the Arkansas residential-burglary statute is not generic, but with a different state-specific rationale. He posits (Br. 26) that the Arkansas law would cover "an ordinary motor vehicle," because it defines a "[r]esidential occupiable structure" to include "a vehicle, building, or other structure: * * * In which any person lives." Ark. Code

Ann. § 5-39-101(4)(A) (2013). Sims acknowledges, however, that no published Arkansas judicial opinion has applied the statute to "an ordinary car," *Sims* Br. 29-30, and he fails to satisfy his own requirement to show that the statute is "facially broader than the locational element of generic burglary," *id.* at 32.

In particular, Sims provides no basis for assuming that a car in which someone "lives," within the meaning of Arkansas law, would be structurally "ordinary," so as to fall outside what he assumes to be the typical scope of residential-burglary laws. To the contrary, if someone "live[s]"—*i.e.*, "occup[ies] a home," *Webster's Third* 1323—in a vehicle, then that vehicle will exhibit some physical alterations or modifications (*e.g.*, a repository for valuables or curtains for privacy) that adapt it to that purpose. The burglary of such a vehicle would therefore likely be covered by at least some burglary statutes encompassing structures "adapted" for overnight accommodation. Furthermore, Sims himself identifies (Br. 27 & n.7) a number of state burglary statutes in effect in 1986 that are similar to Arkansas's, and even his count is incomplete. See, *e.g.*, Ill. Rev. Stat. ch. 38, paras. 2-6, 19-3(a) (1983); La. Rev. Stat. Ann. § 14:62.2 (West 1986); Minn. Stat. § 609.581(2) and (3) (1986); *id.* § 609.582(1)(a) and (2)(a).

2. This Court should disregard respondents' untimely request to overrule well-established precedent

This Court should not consider respondents' request—made for the first time in their merits briefs—that this Court overrule *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998); extend the constitutional right recognized in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), to the fact of a prior conviction; and "hold [that]

the sentencing structure of the ACCA is unconstitutional." *Stitt* Br. 35; see *Sims* Br. 43. Respondents' newly sprouted constitutional claim is not fairly included in (or logically antecedent to) the question presented, see Sup. Ct. R. 14.1(a), and it has not been preserved at any time in these proceedings. These cases therefore are not "appropriate" ones, *Stitt* Br. 35 (citation omitted); *Sims* Br. 41 (citation omitted), in which to consider it.

This Court has also recently and repeatedly reiterated that the *Apprendi* rule applies only to penalty-enhancing facts "[o]ther than the fact of a prior conviction." 530 U.S. at 490; see also, *e.g.*, *Descamps* v. *United States*, 570 U.S. 254, 269 (2013); *Alleyne* v. *United States*, 570 U.S. 99, 111 n.1 (2013); *Southern Union Co.* v. *United States*, 567 U.S. 343, 346 (2012); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 567 n.3 (2010). And it has frequently interpreted the ACCA without reconsidering *Almendarez-Torres*. See, *e.g.*, *Mathis*, 136 S. Ct. 2243; *Descamps*, 570 U.S. 254. It should follow the same course here.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgments of the courts of appeals should be reversed and the cases remanded for further proceedings.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

SEPTEMBER 2018

Nos. 17-765 and 17-766

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

VICTOR J. STITT, II,
Respondent.

UNITED STATES OF AMERICA,
Petitioner,

v.

JASON DANIEL SIMS,
Respondent.

On Writs Of Certiorari To The United States Courts Of Appeals For The Sixth and Eighth Circuits

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a state burglary statute that permits conviction for burglary of a temporary space or a vehicle that is adapted or used for occasional overnight accommodation exceeds the generic crime of "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii).

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL"), founded in 1958, is a nonprofit voluntary professional bar association comprised of private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. NACDL has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL often files *amicus* briefs in this Court in cases presenting issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system. It has participated as an *amicus* in many of this Court's decisions involving the Armed Career Criminal Act of 1984, including *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *Descamps v. United States*, 570 U.S. 254 (2013); and *Mathis v. United States*, 136 S. Ct. 2243 (2016).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Armed Career Criminal Act of 1984 ("ACCA") imposes a 15-year mandatory minimum sentence for certain federal criminal defendants who have three

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or their counsel made a monetary contribution to this brief's preparation or submission. All parties have consented to the filing of this brief.

prior convictions for a "violent felony," as defined under the ACCA, including "burglary." 18 U.S.C. §§ 924(e)(1), (e)(2)(B)(ii) (2018).

In *Taylor v. United States*, this Court held that ACCA burglary refers to the generic crime of burglary, which the Court defined as "an unlawful or unprivileged entry into . . . a building or other structure, with intent to commit a crime." 495 U.S. 575, 598 (1990). The Court provided this definition to fill a gap created by Congress when, in the course of amending the ACCA in 1986, it removed—apparently inadvertently—the definition of burglary included in the 1984 version of the act. As relevant here, *Taylor* and its progeny make clear that a state burglary statute is "broader than generic burglary"—and thus cannot give rise to a predicate offense of ACCA burglary—if it reaches "places" beyond "a building or other structure." *Mathis v. United States*, 136 S. Ct. 2243, 2248, 2250 (2016). Thus, in *Mathis*, the Court distinguished between "buildings and other structures" on the one hand, and "vehicles" on the other hand, and held that while the former "satisfy the generic definition" of burglary, the latter do not. *Id.* at 2250.

The main issue in these cases is whether vehicles used for occasional overnight accommodation, such as the sleeping cab of an 18-wheeler or fishing boat, qualify as a "building or other structure" under the generic definition of burglary. They do not. The Court in *Taylor* made clear that "there is nothing in the history [of the ACCA] to show that Congress intended in 1986 to replace the 1984 'generic' definition of burglary"—which was expressly limited to "buildings"—with something entirely different. 495 U.S. at 590; *see also*

18 U.S.C. § 1202(c)(9) (1984). A building is, quite obviously, a permanent, immovable structure very much unlike an 18-wheeler. This Court's reference to "other structure[s]" in *Taylor* was not intended to expand the generic crime of burglary to mobile living spaces. Rather, it must be understood to refer to edifices that, while not traditional buildings, are similar in kind to buildings, *i.e.*, permanent and immovable.

The government seeks to shoehorn into *Taylor*'s reference to "other structure[s]" what it calls "nonpermanent or mobile dwellings" that are "adapted or used for overnight accommodation." U.S. Br. 16–27. The government's proposed definition of ACCA burglary would undermine *Taylor* and its progeny and obliterate the sharp distinctions this Court has repeatedly drawn between generic burglary and broader crimes defined in certain state burglary statutes.

The government argues that its proposed definition is supported by the state statutes in place in 1986, when Congress amended the ACCA. But neither those statutes nor the state burglary statutes in place in 1984, when the ACCA was initially enacted, reflect a broad consensus—or any consensus at all—among the states that the generic definition of burglary encompassed temporary spaces and vehicles with overnight accommodations, let alone those specifically used for sleeping. As this Court observed in *Taylor*, "the word 'burglary' has not been given a single accepted meaning by the state courts; the criminal codes of the States define burglary in many different ways." 495 U.S. at 580. To the extent there was any consensus among states regarding the generic definition of burglary in 1984 or 1986, nothing supports the gov-

ernment's assertion that most states understood generic burglary to include mobile vehicles used for overnight accommodation.

The government's definition also does not close the alleged "untenable statutory gap" between ACCA burglary and the crime of burglary defined in relevant state statutes. U.S. Br. 26. Many of these state statutes extend to conduct beyond the government's proposed definition because they cover entry of temporary spaces or mobile vehicles either (i) irrespective of the purpose of the space or vehicle, or (ii) for specified purposes that extend beyond overnight accommodation. Thus, even under the government's expanded definition, numerous state burglary offenses would fail to qualify as ACCA sentencing predicates. The government's "solution" thus does not solve its purported "gap" problem.

Finally, this Court has correctly looked to objective form, rather than subjective use, in determining whether certain spaces are encompassed by the ACCA's generic definition of "burglary." This bright-line rule affords consistency in applying the ACCA and makes practical sense. The government's expanded definition of "generic burglary"—which hinges on a space's actual or intended use—would engender confusion and result in inconsistent application of the ACCA. It would also run afoul of the rule of lenity.

For all these reasons, the Court should hold that a state statute permitting conviction for unlawful entry of a temporary space or vehicle used for occasional overnight accommodation is broader than the definition of generic burglary under the ACCA.

ARGUMENT

I. When the ACCA Was Enacted in 1984 and Amended in 1986, the Majority of States' Burglary Statutes Distinguished Between Structures and Both Temporary Spaces and Mobile Vehicles.

As the government notes, "*Taylor*'s definition of burglary was meant to reflect the 'generic sense' in which 'most States' defined the term" at the time of the ACCA's passage. U.S. Br. 33 (quoting 495 U.S. at 598). The government bases its new definition on the premise that there was a "broad consensus in 1986 that burglary included nonpermanent or mobile structures adapted or used for overnight accommodation." *Id.* at 19. That premise is false.

1. When Congress enacted the ACCA in 1984 and amended it in 1986, the majority of states' burglary statutes distinguished, in one way or another, between structures, such as buildings, on the one hand, and temporary spaces or mobile vehicles—even if habitable—such as RVs, boats, or railroad cars, on the other hand. That distinction between structures and vehicles existed regardless of whether the latter were purposed or used for overnight accommodation. For example, Wisconsin's burglary statutes distinguished between burglary of "[a]ny building or dwelling," on the one hand, and burglary of a "motor home or other motorized type of home or a trailer home." Wisc. Stat. Ann. § 943.10 (1978); *see also, e.g.*, Tenn. Code Ann. §§ 39-3-401 (1973), 39-3-403 (1982), 39-3-406 (1950) (different burglary statutes for "dwelling house, or any other house, building, room or rooms therein" and "any freight or passenger car, automobile, truck,

trailer or other motor vehicle").[2] Similarly, North Carolina had separate burglary statutes entitled "breaking or entering buildings generally" and "breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats, or other watercraft." N.C. Stat. Ann. §§ 14-54 (1981), 14-56 (1979).[3]

In other states, burglary statutes delineated the types of fixed, stationary objects that would constitute—or be deemed similar to—buildings, as distinct from non-permanent spaces, mobile vehicles, or other objects. *See, e.g.*, Idaho Code § 18-1401 (1981) ("Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, *or other building*, tent, vessel, closed vehicle, closed trailer, airplane or railroad car, with intent to commit any theft or any felony, is guilty of burglary." (emphasis added)).[4] Similarly, numerous states had

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[2] Citations to historical versions of state statutes (Pts. I, II & IV) refer to the effective dates of those statutes. Unless otherwise noted, the language of such statutes remained unchanged between the effective dates and 1986. Citations to present-day state statutes (Pt. III) are to the current annotated codes.

[3] The government's chart of state burglary statutes in effect at the time of the 1986 amendments to the ACCA does not include certain burglary-related statutes in effect at that time that are relevant to the analysis, including North Carolina's statute criminalizing breaking or entering vehicles. *See* U.S. Br. App'x B at 33a.

[4] *See also, e.g.*, Cal. Penal Code § 459 (1984) (defining burglary to include "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse *or other building*, tent, vessel, railroad car, . . . trailer coach, . . . house car, . . . inhabited camper, . . . aircraft . . ." (emphasis added)); D.C. Code § 22-1801(b) (1973) (defining burglary to include "any dwelling, bank,

burglary statutes and definitions that listed the term "building" as part of a disjunctive list which included non-permanent and mobile objects, such as "mobile home," "vehicle" or "aircraft." *See* Ill. Stat. Ann. ch. 38, ¶ 19-1 (1982) (defining burglary to include "a building, housetrailer, watercraft, aircraft, motor vehicle[,] . . . railroad car, *or* any part thereof" (emphasis added)).[5] By doing so, these states demonstrated a

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store, warehouse, shop, stable, *or other* building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car" (emphasis added)); Mich. Comp. Laws § 750.110 (1968) (defining burglary, under the title "breaking and entering," to include "any tent, hotel, office, store, shop, warehouse, barn, granary, factory *or other building*, structure, boat or ship, railroad car or any private apartment in any of such buildings or any . . . dwelling house" (emphasis added)); Miss. Code Ann. § 97-17-33 (1960) (burglary of non-dwelling building statute applies to "any shop, store, booth, tent, warehouse, *or other building* or private room or office therein, ship, steamboat, flatboat, railroad car, automobile, truck or trailer in which any goods, merchandise, or valuable thing shall be kept for use, sale, deposit, or transportation" (emphasis added)); Nev. Rev. Stat. § 205.060 (1983) (burglary statute applies to "any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse *or other building*, tent, vessel, vehicle, vehicle trailer, semitrailer or housetrailer, airplane, glider, boat or railroad car" (emphasis added)).

[5] *See also, e.g.*, Ariz. Rev. Stat. § 13-1501 (1978); Ark. Stat. § 5-39-202 (1975); Fla. Stat. Ann. § 810.011(2) (1982); Ga. Code Ann. § 16-7-1 (1980); Iowa Code Ann. §§ 713.1, 702.12 (1984); Kan. Stat. Ann. § 21-3715 (1969); Me. Stat. Ann. tit. 17-A §§ 401 (1985), 2 (1983); Mass. Gen. Laws Ann. ch. 266 §§ 16 (1974), 16A (1966); Mo. Ann. Stat. §§ 569.010, 569.160, 569.170 (1979); Mont. Code Ann. §§ 45-6-204, 45-2-101(40) (1981); N.H. Rev. Stat. Ann. § 635:1 (1973); N.J. Stat. Ann. § 2C:18-1 (1980); N.D. Cent. Code Ann. §§ 12.1-22-02, 12.1-22-06, 12.1-05-12 (1973); Ohio Rev. Code Ann. §§ 2911.11 (1983), 2911.12 (1982), 2909.01 (1974); Pa. Cons. Stat. Ann. §§ 3501, 3502 (1973); S.D. Codified Laws §§ 22-

clear "intent to give the nouns their *separate*, normal meanings." *Garcia v. United States*, 469 U.S. 70, 73 (1984) (emphasis added).

Of the minority of states that turned "building" into a defined term that reached non-permanent objects, or mobile vehicles, adapted for a specific purpose or purposes, most made clear that, by doing so, they were expanding the term building beyond its "ordinary meaning." For example, Connecticut's burglary statutes at the time covered entering or unlawfully remaining in, *inter alia*, a "building," which Connecticut's legislature defined to include, "*in addition to its ordinary meaning* . . . any watercraft, aircraft, trailer, sleeping car, railroad car, other structure or vehicle or any building with a valid certificate of occupancy." Conn. Gen. Stat. Ann. § 53a-100 (1979) (emphasis added); *see also id.* §§ 53a-101 (1981), 53a-102 (1971), 53a-102a (1976), 53a-103 (1971), 53a-103a (1975). The state legislatures of Alaska, Delaware, Kentucky, New York, Oregon, and Utah were likewise explicit about their decision to expand the term "building," as used in their respective states' burglary statutes in effect at the time, beyond the "ordinary" or "usual" meaning of that word.[6]

32-1, 22-1-2 (1976); W. Va. Code § 61-3-12 (1923); *cf.* Tex. Penal Code Ann. §§ 30.01, 30.02, 30.04 (1974).

[6] Notably, each of these statutes nonetheless lists "structure" and "vehicle" as two separate things, rather than referring to vehicles (or any subsets of vehicles) as types of structures. In particular, none of these statutes includes *any* type of vehicle in a list that ends with "or other structures." *See* Alaska Stat. § 11.81.900 (1984) (defining "building," for purposes of burglary statutes, as including, "*in addition to its usual meaning*, [] any

Accordingly, the plain, ordinary meaning of the term "building" as used by Congress in 1984—and as recognized by most states in 1984 and 1986—did *not* include mobile vehicles, regardless of whether adapted or used for overnight accommodation.

2. Although this Court held in *Taylor* that "the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building *or other structure*, with intent to commit a crime," 495 U.S. at 598 (emphasis added), that term should not—and cannot fairly—be read as bringing an entirely new category of crimes within the scope of burglary under the ACCA. The phrase "building or other structure" on its face suggests that an "other structure"

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propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business" (emphasis added)); Del. Code tit. 11 § 222 (1973) (defining "building," for purposes of the criminal code, as including, "*in addition to its ordinary meaning*, [] any structure, vehicle or watercraft" (emphasis added)); Ky. Rev. Stat. § 511.010 (1980) (defining "building," for purposes of burglary statutes, to include "*in addition to its ordinary meaning*, [] any structure, vehicle, watercraft or aircraft: (a) [w]here any person lives; or (b) [w]here people assemble for purposes of business, government, education, religion, entertainment or public transportation" (emphasis added)); N.Y. Penal Law § 140.00 (1979) (defining "building," for purposes of burglary statutes, to include "*in addition to its ordinary meaning*, [] any structure, vehicle or watercraft used for overnight lodging of persons, or used by persons for carrying on business therein, or used as an elementary or secondary school" (emphasis added)); Utah Code Ann. § 76-6-201 (1973) (defining "building," for purposes of burglary statutes, as including "*in addition to its ordinary meaning*, [] any watercraft, aircraft, trailer, sleeping car, or other structure or vehicle adapted for overnight accommodation of persons or for carrying on business therein" (emphasis added)).

"must be similar in kind to" a building, *see Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 628 (2018) (discussing "effluent limitation or other limitation"). Because mobile vehicles with sleeping accommodations such as RVs and sailboats are decidedly *dissimilar* to buildings—regardless of the purpose for which they are used—the government's position is untenable.

It is also irreconcilable with this Court's conclusion in *Taylor* that the generic definition of ACCA burglary "is *practically identical* to the 1984 definition that, in 1986, was omitted from the enhancement provision," 495 U.S. at 598 (emphasis added)—namely, burglary of a building. This Court refused to "draw [an] inference" from Congress' omission of the 1984 definition of burglary in the 1986 version—noting, among other things, that "[t]he legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process." *Id.* at 589–590.

In encompassing mobile vehicles with sleeping accommodations—something decidedly dissimilar from buildings or other structures—the government's proposed definition of burglary would effectively "replace the 1984 'generic' definition of burglary with something entirely different," which is precisely what this Court sought to avoid in *Taylor*. *Id.* at 590. It is for this reason that this Court has repeatedly refused to expand the meaning of "structure" as used in *Taylor* to encompass movable objects such as vehicles.[7]

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[7] *See Shepard v. United States*, 544 U.S. 13, 15–16 (2005) (distinguishing between an immobile "building or enclosed space" and a "boat or motor vehicle," and finding that burglary of only the former falls within the generic definition of burglary); *see*

II. THE GOVERNMENT'S POSITION THAT THERE WAS A "BROAD CONSENSUS" IN 1986 THAT BURGLARY COVERED TEMPORARY SPACES OR MOBILE VEHICLES ADAPTED OR USED FOR OVERNIGHT ACCOMMODATION IGNORES FUNDAMENTAL DIFFERENCES AMONG THE 1986 STATE STATUTES.

The government's assertion that there was a "broad consensus in 1986 that burglary included non-permanent or mobile structures adapted or used for overnight accommodation," U.S. Br. 19, is a gross overstatement that ignores fundamental—and, in some cases, irreconcilable—differences among the state statutes. A survey of the state burglary statutes in effect in 1986 shows that almost every state took a different approach to this issue, using definitions of burglary that varied not just among states but also across statutes within a single state, and even within a single statute. Far from reflecting a "broad consensus" about anything, the 1986 state burglary statutes reveal a thicket of distinctions, nuances, and inconsistencies from which the government's proposed redefinition of ACCA burglary could not—and cannot today—fairly be gleaned.

1. By the government's own count, only twenty-five states had burglary statutes in effect in 1986 that, as the government puts it, expressly "encompass[ed]

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also, e.g., *Descamps v. United States*, 570 U.S. 254, 261 (2013) (noting that one portion of a statute prohibiting burglary of "a building" "corresponds to an element in generic burglary," and thus falls within the scope of ACCA burglary, "whereas the other [portion covering] an automobile[] does not"); *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (differentiating between "breaking into a building," which would qualify as generic burglary, and breaking into a "vessel," which would not).

nonpermanent or mobile structures used for enumerated purposes." U.S. Br. App'x B at 21a.[8] And even as to those twenty-five, the "enumerated purposes" for which nonpermanent objects or mobile vehicles could be used varied tremendously among burglary statutes, often including purposes well beyond the specific one—overnight accommodation—that the government propounds here. For example, Arkansas's burglary statutes encompassed, *inter alia*, vehicles and other places in which "people assemble for purposes of business, government, education, religion, entertainment or public transportation." Ark. Stat. §§ 5-39-101, 5-39-201 (1975); *see also, e.g.*, N.Y. Penal Law § 140.00(2) (1979) (enumerated purposes for which structure or vehicle could be used for purposes of burglary statute included use "for overnight lodging of persons, . . . or carrying on business[,] . . . or elementary or secondary school").

2. Even among the "enumerated purposes" that arguably related to human habitation, there existed significant variations. Only thirteen states had burglary statutes using the phrase "overnight accommodation" to qualify use of a mobile or nonpermanent

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[8] While the government relies on an additional nineteen statutes from 1986 to support the proposition that generic burglary included "permanent or non-mobile structures used or adapted for overnight accommodation," the government concedes that those statutes "encompass[ed] nonpermanent or mobile structures *irrespective of their purpose*." U.S. Br. App'x B at 21a (emphasis added). Accordingly, Congress could not have gleaned from those statutes a generic definition of burglary relating to a structure's specific purpose or use for "overnight accommodation."

space. And states interpret "overnight accommodation" differently. *Compare, e.g.*, *Blankenship v. State*, 780 S.W.2d 198, 210 (Tex. Crim. App. 1988) (en banc) (space was "adapted for overnight accommodation" despite the fact that it was being used only to store property, and the water and utilities had been turned off for years), *with Commonwealth v. Graham*, 9 A.3d 196, 197, 204 (Pa. 2010) (space was not adapted for overnight accommodation even where it had heat and running water). As the court in *Blankenship* emphasized, "[w]hat makes a structure 'suitable' or 'not suitable' for overnight accommodation is a complex, subjective factual question." 780 S.W.2d at 209.

Other statutes referred to uses such as, *inter alia*, "sleeping, living, or lodging," Ala. Code §§ 13A-7-1(2) (1983), 13A-7-5 (1979) (first-degree burglary of dwelling); "human habitation and occupancy," W. Va. Code § 61-3-11 (1973) ("[b]urglary; entry of dwelling or outhouse"); lodging "with a view to the protection of property," S.C. Code Ann. §§ 16-11-10 (1962), 16-11-311 (1985), 16-11-312 (1985) (first-degree and second-degree burglary involving "dwelling"); use as "a person's permanent or temporary home or place of lodging," Alaska Stat. §§ 11.81.900(17) (1984), 11.46.300(a)(1) (1978) (first-degree burglary involving dwelling); and use as "a dwelling place or place of human habitation," Va. Code Ann. § 18.2-90 (1975) (burglary statute covering certain mobile places).[9]

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[9] The government's chart of state burglary statutes obscures critical differences among statutes even within a single state. For example, although the government's Appendix B cites Alabama statutes in effect in 1986 that covered burglary of "dwell-

The statutes varied further as to whether a place had to be "used" for the enumerated purpose, or whether it was sufficient that it was "adapted," "designed," or "intended" for that purpose, or even simply "suitable" for such purpose. *Compare, e.g.*, Ala. Code § 13A-7-1(2) (defining "building," for purposes of burglary statutes, as including vehicles "used for the lodging of persons"), *with, e.g.*, Alaska Stat. § 11.81.900(3) (defining "building," for purposes of burglary statutes, as including vehicles "adapted for overnight accommodation"), *and* Ga. Code Ann. § 16-7-1 (1980) (including within burglary statute mobile places "designed for use as the dwelling of another"), *and* Minn. Stat. § 609.581(2) (1983) (defining "building," for purposes of burglary statutes, as including structures "suitable for affording shelter for human beings"). And even among those statutes requiring active "use" of a vehicle or other place for an enumerated purpose, the requisite extent and frequency of that use varied. While some statutes did not specify the degree or frequency of use, others required that such locations be used "customarily" or "usually," or "for the time being." *Compare, e.g.*, Va. Code Ann. § 18.2-90 (1975) (including within burglary statute mobile places "used as a dwelling place or place of human habitation"), *with, e.g.*, Ark. Stat. § 5-39-101(1) (1975) (defining "occupiable structure," for purposes of burglary statutes, as

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ing[s]" and "building[s]," it includes only the definition of "building"—"[a]ny structure which may be entered and utilized for business, public use, lodging, or the storage of goods, . . . includ[ing] any vehicle, aircraft or watercraft used for the lodging of persons or carrying on business therein," Ala. Code. § 13A-7-1(2)—while omitting the definition of "dwelling," which was defined as "[a] building . . . used or normally used by a person for sleeping, living or lodging therein," *id.* § 13A-7-1(3).

including vehicles "customarily used for overnight accommodation"), *and* Haw. Rev. Stat. Ann. § 708-800 (1979) (defining "dwelling," for purposes of burglary statutes, as including mobile places "usually used by a person for lodging"), *and* N.D. Cent. Code Ann. § 12.1-05-12(2) (1973) (defining "dwelling," for purposes of burglary statutes, as including any "movable" structure vehicle that "is for the time being is a person's home or place of lodging").

Faced with these variations and distinctions, Congress could not reasonably have divined the principle proposed by the government: that vehicles "used or adapted for overnight accommodation" fall within the generic meaning of burglary.

III. The Addition of Temporary Spaces and Mobile Vehicles Adapted for Overnight Accommodation to the Generic Definition of Burglary Fails to Close the Purported "Gap" Between the ACCA and State-Law Definitions of Burglary, as Numerous State Burglary Statutes Would Remain Overbroad.

The government suggests that reading *Taylor*'s reference to "building or other structure" to include temporary spaces and mobile vehicles adapted for overnight accommodation would close an "untenable statutory gap in the [ACCA's] definition" of burglary. U.S. Br. 26. Not so. Many of the statutes to which the government points would not count as burglary under the government's own definition, because they (i) cover spaces or vehicles irrespective of their purpose, or (ii) extend to spaces or vehicles that have specified purposes beyond overnight accommodation.

1. The government does not question this Court's well-established use of the categorical approach to determining whether a prior conviction qualifies as an ACCA predicate offense. *See Mathis*, 136 S. Ct. at 2248; *Descamps v. United States*, 570 U.S. 254, 260–61 (2013). The first step in the analysis is to determine "whether the elements of the crime of conviction sufficiently match the elements of [the generic ACCA crime], while ignoring the particular facts of the case." *Mathis*, 136 S. Ct. at 2248.

If the elements of the state offense and "generic" federal offense listed as an ACCA predicate match, or "if the state statute defines the crime more narrowly," the state offense qualifies as an ACCA predicate. *Descamps*, 570 U.S. at 261; *see also Taylor*, 495 U.S. at 599. If, however, the state offense reaches more broadly, courts consider whether the statute is divisible. *See Descamps*, 570 U.S. at 261–62. To be divisible, a statute must set out elements—those findings upon which a jury must unanimously agree to convict—in the alternative. *See Mathis*, 136 S. Ct. at 2249; *Descamps*, 570 U.S. at 272. If the statute is divisible, the Court proceeds to the "modified categorical" approach, which authorizes consideration of a limited set of documents from the criminal record to "to determine which statutory phrase was the basis for the conviction." *Descamps*, 570 U.S. at 263 (internal quotation marks and citation omitted).

2. Even adopting the government's expanded reading of "building or other structure," the categorical approach reveals that numerous state burglary statutes would be too broad to qualify as burglary under the ACCA. While the government correctly notes that many states have "specifically delineated"—that

is, made some mention of—nonpermanent objects or mobile vehicles in their burglary statutes, U.S. Br. 18, a closer review of those statutes reveals that they extend to a variety of other uses beyond overnight accommodations. Unless a state burglary statute can accommodate a discrete jury finding that the defendant burglarized a vehicle *used for overnight accommodation*, as opposed to some other purpose, its continued overbreadth precludes its use as an ACCA predicate.

For example, many burglary statutes would remain overbroad because they include within their sweep vehicles and other places used for business purposes or storage. *See, e.g.*, Alaska Stat. Ann. §§ 11.46.310, 11.81.900(b)(5) (2018) (Alaska second-degree burglary, involving a "building," defined to include "any propelled vehicle or structure adapted for . . . carrying on business"); Colo. Rev. Stat. §§ 18-4-101, 18-4-202, 18-4-203 (2018) (Colorado first-degree and second-degree burglary, involving a "building or occupied structure," with "building" defined to include any "vehicle adapted . . . for carrying on of business therein" and "occupied structure" defined to include places "which, for particular purposes, may be used by . . . animals").[10] Other state burglary statutes would

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[10] *See also* D.C. Code § 22-801(b) (2018) (District of Columbia second-degree burglary, which may involve any "vessel," "watercraft," or "yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade"); Iowa Code Ann. §§ 702.12, 713.1, 713.3, 713.5 (2018) (Iowa burglary offenses involving an "occupied structure," defined to include any "land, water or air vehicle . . . occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value"); *id.* § 713.6A (2017) (same);

remain overbroad because they include places used for public assembly and public transportation, such as city buses. *See, e.g.*, Ky. Rev. Stat. Ann. §§ 511.010(1), 511.020, 511.040 (2018) (Kentucky first-degree and third-degree burglary involving a "building," which includes any "vehicle, watercraft or aircraft" where "people assemble for purposes of business, government, education, religion, entertainment or public transportation"). Still others would remain overbroad because they cover vehicles and other places without limitation. *See, e.g.*, Idaho Code Ann. § 18-1401 (2018) (Idaho burglary extending to any "vehicle, trailer, airplane or railroad car").[11]

Mo. Ann Stat. §§ 569.010(2), 569.160, 569.170 (2018) (Missouri first-degree and second-degree burglary involving a "building or inhabitable structure," with "inhabitable structure" defined to include a "vehicle, vessel or structure . . . [w]here any person . . . carries on business or other calling"); Mont. Code Ann. §§ 45-2-101(47), 45-6-204 (2017) (Montana burglary and aggravated burglary involving an "occupied structure," defined to include any "building, vehicle, or other place suitable for . . . carrying on business"); N.H. Rev. Stat. Ann. § 635:1(I), (III) (2018) (New Hampshire burglary involving a "building or occupied structure," which includes any "vehicle, boat or place" adapted "for carrying on business therein"); N.D. Cent. Code Ann. §§ 12.1-22-02, 12.1-22-06(4) (2017) (North Dakota burglary involving a "building or occupied structure," which includes any vehicle "[w]here any person . . . carries on business or other calling"); Or. Rev. Stat. Ann. §§ 164.205(1), 164.215 (2018) (Oregon second-degree burglary involving a "building," defined to include vehicles, boats, and aircraft adapted "for carrying on business therein"); Utah Code Ann. §§ 76-6-201(1)(a), 76-6-202, 76-6-203 (2018) (Utah burglary and aggravated burglary, involving a "building," defined to include any "watercraft, aircraft, trailer or . . . vehicle adapted . . . for carrying on business").

11 *See also, e.g.*, Cal. Penal Code §§ 459, 460(b) (2018) (California second-degree burglary, extending to any "vehicle . . . when

For these reasons, a wide variety of state burglary statutes would remain overbroad, and thus disqualified as ACCA predicates, regardless of which party's interpretation is adopted. The government's purported attempt to bridge an "untenable gap in the statutory definition" of burglary, U.S. Br. 26, by expanding the definition, falls short.

IV. THE ACCA IS PROPERLY FOCUSED ON FORM, RATHER THAN FUNCTION, IN DELINEATING THOSE PLACES ENCOMPASSED BY GENERIC BURGLARY.

This Court has correctly looked to objective form, rather than subjective use, in determining whether certain spaces are encompassed by the ACCA's generic definition of "burglary." This bright-line rule affords consistency in applying the ACCA and makes practical sense. The government's expanded definition of "generic burglary"—which hinges on an object's actual or intended use—would engender confusion

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the doors are locked"); Mich. Comp. Laws Ann. § 750.110 (2018) (Michigan burglary extending to any "boat, ship, shipping container, or railroad car"); Nev. Rev. Stat. Ann. § 205.060 (2017) (Nevada burglary extending to "any vehicle, trailer, semitrailer or house trailer"); N.J. Stat. Ann. §§ 2C:18-1, 2C:18-2 (2018) (New Jersey burglary involving a "structure," defined to include "any . . . ship, vessel, car, vehicle or airplane"); S.D. Codified Laws §§ 22-1-2(28)(c), 22-1-2(49), 22-32-1, 22-32-3 (2018) (South Dakota first-degree and second-degree burglary, involving an "occupied structure," defined to include any "motor vehicle, watercraft, aircraft, railroad car" "in which at the time any person is present"); *id.* §§ 22-1-2(49), 22-1-2(51), 22-32-8 (2018) (South Dakota third-degree burglary, defined to include any "unoccupied" "motor vehicle, watercraft, aircraft, railroad car"); Wyo. Stat. Ann. § 6-3-301(a) (2018) (Wyoming burglary extending to any "building, occupied structure or vehicle," without regard to the vehicle's use).

and almost certainly result in inconsistent application of the ACCA. It would also run afoul of the rule of lenity, which is particularly important in the context of the ACCA's mandatory fifteen-year sentence.

1. In clarifying the ACCA's scope in *Taylor*, the Court emphasized the distinction between buildings and structures, on the one hand, and vehicles or other mobile habitations on the other. Indeed, the Court expressly pointed to a Missouri statute criminalizing burglary of temporary spaces or mobile vehicles, including "any booth or tent, or any boat or vessel, or railroad car," as encompassing conduct beyond the ACCA's generic definition of "burglary." *Taylor*, 495 U.S. at 599. The *Taylor* Court also considered a range of Texas statutes that it identified as "includ[ing] theft from . . . [an] automobile." *Id.* at 591 (citing, *inter alia*, Tex. Penal Code §§ 30.01, 30.02, 30.04). One of the cited Texas "burglary" statutes was limited to burglaries occurring in a "habitation, or a building," with "habitation" defined as any "structure or vehicle that is adapted for the overnight accommodation of persons." Tex. Penal Code §§ 30.01, 30.02 (1974). Another "burglary" statute cited was entitled "burglary of vehicles." Tex. Penal Code § 30.04 (1974). The Court used these Texas statutes as support for its statement that burglary of automobiles—as opposed to entries of buildings or structures—falls outside the scope of ACCA burglary. *See Taylor*, 495 U.S. at 599.

Since *Taylor*, numerous courts—including this one—have looked to form, rather than intended or actual use, in determining whether entry of a place is burglary under the ACCA. In *Mathis*, 136 S. Ct. 2243, for instance, the Court considered an Iowa statute criminalizing burglary of an "occupied structure,"

which the Iowa Code defined as "any building, structure, . . . land, water, or air vehicle, *or similar place adapted for overnight accommodation of persons*," Iowa Code Ann. § 702.12 (1984) (emphasis added).[12] Although this language encompassed vehicles only if they were adapted for "overnight accommodation of persons," the Court held that the statute, "cover[ed] more conduct than generic burglary," because it "reache[d] a broader range of *places*." *Mathis*, 136 S. Ct. at 2250 (emphasis added).

Courts of Appeals have similarly applied a rule that focuses on "the nature of the property or place, not on the nature of its use at the time of the crime." *United States v. Rainer*, 616 F.3d 1212, 1214–15 (11th Cir. 2010) (holding that Alabama burglary statute which penalized entry into any "building," defined to include "any vehicle, aircraft or watercraft used for the lodging of persons," fell outside of the ACCA, and rejecting the argument that a clause limiting "buildings" to those used for lodging "narrow[ed] the burglary statute's sweep to generic burglary"). Thus, in overruling a line of cases finding that burglary of any

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[12] The Iowa statute further defined "occupied structure" to include those "occupied by persons for the purpose of carrying on business or other activity . . . , or for the storage of safekeeping of anything of value." Iowa Code Ann. § 702.12 (1984). As discussed *supra*, this language would have rendered the statute overbroad under even the government's definition of generic burglary. But that was not the basis for this Court's holding that "the elements of Iowa's burglary law [were] broader than those of generic burglary." *Mathis*, 136 S. Ct. at 2257. Rather, this Court limited its analysis and holding to the locational elements of Iowa's statute—which rendered it overbroad—without any consideration of the functional components on which the government's position hinges.

habitable location was subject to the ACCA, the court in *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007), recognized that "*Taylor* jettisoned analyzing the *use* of an object in favor of analyzing the *nature* of the object when it adopted an express definition of burglary that is limited to the breaking and entering of buildings," *id.* at 851 n.5.

2. Limiting the definition of generic burglary by reference to the objective nature of a place makes practical sense. The government's expanded definition—with its newfound focus on a location's use—would create confusion and, almost certainly, produce conflicting decisions among lower courts.

Were the government's definition to prevail, a court applying the ACCA would need to (1) divine what the phrase "adapted or used for overnight accommodation" means—itself no small task, *see supra* Pt. II; and (2) determine whether the particular state statute at issue fit within that definition, *see supra* Pt. III. Given the variations in statutory definitions of use, *see supra* Pt. II—and the variations in how state courts interpret even the same exact terms and phrases, *see id.*—this analysis would almost certainly lead to varying and conflicting results among the lower courts. The government's definition thus threatens to create yet another "judicial morass" under the ACCA. *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015) (citation omitted).

3. The rule of lenity separately instructs that the current construction of the ACCA be retained. Under the rule of lenity, any ambiguity as to the scope of a criminal statute must be resolved in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 347

(1971). The rule applies "not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *see also United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (noting that the rule of lenity could be applied to resolve ambiguity in the Sentencing Reform Act, to the extent it existed). Courts applying the ACCA are thus "guided by the rule of lenity," and will not interpret the ACCA "so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *United States v. Concha*, 233 F.3d 1249, 1256 (10th Cir. 2000) (citation omitted). As Justice Scalia explained, "[t]he rule of lenity, grounded in part on the need to give 'fair warning' of what is encompassed by a criminal statute . . . demands that we give this text [of the ACCA] the more narrow reading of which it is susceptible." *James v. United States*, 550 U.S. 192, 219 (2007) (Scalia, J., dissenting) (citation omitted), *majority op. overruled by Johnson*, 135 S. Ct. 2551.[13]

Broadening the ACCA's definition of "burglary" to include burglaries of temporary spaces and mobile vehicles used for some enumerated purpose, as the government proposes, would improperly sweep into the

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[13] Although this Court refused, in *Taylor*, to apply the rule of lenity as a justification for adopting the common-law definition of burglary, the Court did so because it found the common law definition to be "implausible" and "at odds with the generally accepted contemporary meaning of [the] term ['burglary']." 495 U.S. at 596. Here, by contrast, a definition of generic burglary which excludes moveable vehicles from the meaning of "building or other structure" is eminently reasonable and consistent with the generally accepted meaning of the term "burglary."

statute a new category of criminal activity—without any indication that Congress intended to do so. Particularly where, as here, the statute at issue triggers a fifteen-year mandatory sentence, the rule of lenity should apply: citizens should not be left to "languish[] in prison" unless Congress "has clearly said they should." *Bass*, 404 U.S. at 348 (citation omitted). Congress did not do so here.

CONCLUSION

The judgments of the Court of Appeals for the Sixth Circuit and for the Eighth Circuit should be affirmed.

Respectfully submitted.

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Nos. 17-765 and 17-766

IN THE

Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

VICTOR J. STITT, II,

Respondent.

UNITED STATES,

Petitioner,

v.

JASON DANIEL SIMS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether Tennessee's aggravated burglary statute, Tenn. Code Ann. § 39-14-403, qualifies as a generic "burglary" under the Armed Career Criminal Act, 18 U.S.C. 924(e)(2)(B)(ii).

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INTEREST OF AMICUS CURIAE[1]

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A (recodified at 18 U.S.C. § 3599), and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the NAFD is to promote the interests of justice by appearing as amicus curiae in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. Each year, federal defenders represent tens of thousands of individuals in federal court, including hundreds who are subject to the Armed Career Criminal Act (ACCA). In many of those cases, federal defenders have argued, as respondent does here, that, for purposes of the ACCA, generic burglary involves entry into a "building," as set forth in this Court's decision in *Taylor v. United States*, 495 U.S. 575, 589-90 (1990). *See, e.g., Smith v. United States*, 877 F.3d 720 (7th Cir. 2017); *United States v. Byas*, 871 F.3d 841 (8th Cir.

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1. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* made such a monetary contribution. Letters of consent to the filing of this *amicus* brief from counsel for Petitioner and Respondent Stitt are on file with the author. Respondent Sims has submitted a a letter to the Court granting a blanket consent to *amicus curiae* briefs. *See* Supreme Court Rule 37.2(a).

2017); *United States v. White*, 836 F.3d 437 (4th Cir. 2016); *United States v. Grisel*. 488 F.3d 844 (9th Cir. 2007).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief addresses an issue that the Court should ignore: Is a burglary of a "habitation" as defined by Tennessee law an inherently violent crime? The Court should ignore the issue because it is irrelevant: until very recently, the ACCA's residual clause captured crimes that presented an inherent risk of violence. Yet this irrelevant issue guides the government's entire approach to this case. The government implicitly asks the Court to expand its definition of generic "burglary" to compensate for the loss of the residual clause because it believes that breaking into a tent or Recreational Vehicle (RV), which are Tennessee "habitations," is so inherently violent that Congress must have wanted to classify those crimes as "burglary."

That belief is misguided because Congress had no reason to try to reach all inherently violent break-in offenses with the term "burglary," and, moreover, residential burglary is not actually an inherently violent crime. A recent study conducted under a grant from the U.S. Department of Justice revealed that, according to certain historical data, "violence or threats of it occurred in only 1.2% of residential burglaries[.]" Richard S. Culp et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007*, at 68 (2015) [hereinafter "Culp Report"], available at https://www.ncjrs.gov/pdffiles1/nig/grants/248651.pdf. The Culp Report further explains that, in the rare burglary that does trigger violence, the offender will be prosecuted for the additional violent crime, making it unnecessary to treat the burglary as a proxy for violence. Partly due to the Culp Report, the

U.S. Sentencing Commission has decided to no longer classify the offense of "burglary of a dwelling" as a "crime of violence." U.S.S.G. Appx Amend. 798 (Aug. 1, 2016) ("burglary offenses rarely result in physical violence").

Since even core residential burglaries so rarely result in violence or threats of it, it would be especially unwarranted for the Court, after nearly thirty years, to redefine the statutory term "burglary" to encompass a crime that could be as minor as stealing from an unoccupied tent or from an RV. When the government repeatedly talks about the inherent dangerousness of residential burglaries, it waives a red herring that, in addition to being irrelevant, is insubstantial.

ARGUMENT

I. Congress Intended for the Term "Burglary" to Cover Typical Burglaries and for the Residual Clause to Cover Atypical Ones.

When assessing Congress's intended scope of the term "burglary," the government ignores that Congress, when amending the ACCA in 1986, added a broader definition of violent felony that included a "catch-all provision," *Sessions v. Dimaya*, 138 S. Ct. 1204, 1222 n.12 (2018), known as the residual clause. The residual clause reached any offense that "presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

That clause helped to greatly expand the reach of the ACCA because, as originally enacted in 1984, the ACCA reached only "robbery or burglary," 18 U.S.C. § 1202 (1984), and Congress had defined "burglary" in a generic way, as pertaining to breaking into any "building" with

the requisite intent. 18 U.S.C. § 1202(c)(9) (1984). Although that statutory definition was broader than the common-law definition (since it reached all types of buildings, not just "dwelling house[s]"[2]), it reached only burglaries that were typical. That is, it certainly did *not* reach atypical burglaries involving places like a live-aboard sailboat, RV, or tent.

In 1986, Congress used that same simple term "burglary" as a component of its new violent-felony definition. Pub. L. No. 99-570 § 1402(a), 100 Stat. 3207-39 (Oct. 27, 1986). At that time, it omitted from the ACCA its express definition of burglary, while also creating the residual clause as a new component. *Id.*; *see Taylor*, 495 U.S. at 582. Going forward, Congress expected that the enumerated term "burglary" would reach typical burglaries, just as it had since 1984, and that the residual clause would reach atypical ones, *e.g.*, crimes involving the invasion – or attempted invasion – of an occupied RV or live-aboard sailboat. *See id.* at 600 n.9 (explaining that the residual clause might reach break-in offenses falling beyond the scope of "burglary"); *James v. United States*, 550 U.S. 192, 203 (2007) (relying on residual clause to reach attempted burglary); *see also, e.g., United States v. Ghoston*, 530 F. App'x 468, 469-70 (6th Cir. 2013) (relying on residual clause to reach Tennessee attempted aggravated burglary).

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2. "Burglary was defined by the common law to be the breaking and entering of the dwelling house of another in the nighttime with the intent to commit a felony." *Taylor v. United States*, 495 U.S. 575, 580 n.3 (1990).

After the 1986 amendments, the federal courts of appeals debated how to define the now-undefined term "burglary." None arrived at the complicated definition that the government now proposes. The courts broke essentially into three camps, respectively concluding that Congress meant: (1) to retain the 1984 statutory definition ("building"); (2) to adopt the common-law definition, which would restrict burglaries to dwelling houses in nighttime; or, (3) to accept as a burglary whatever any state happened to label "burglary," which would make the ACCA reach offenses as slight as "shoplifting." *Taylor*, 495 U.S. at 580 n.2, 591.

In 1990, this Court resolved the disagreement by siding with the first camp. It found that Congress's deletion of the 1984 definition of burglary seemed "inadvertent," that Congress must have intended a single generic definition like its 1984 definition, and that modern burglary statutes "'typically describe the place as a 'building' or 'structure.'" *Taylor*, 495 U.S. at 589-90, 598 (quoting 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.13(c) (1986)). Accordingly, it decided Congress meant burglary to reach typical burglaries – those that occur in any "building or other structure." *Id.* And it explained that the term "burglary" did not reach atypical burglaries, *e.g.* a Missouri burglary statute that covered "'any booth or tent, or any boat or vessel, or railroad car.'" *Id.* at 599 (quoting Mo. Rev. Stat. § 560.070 (1969)).

The government, studiously ignoring the residual clause,[3] now asks the Court to redefine "burglary" to reach

3. The government characterizes the term "burglary" as a "critical statutory term" as it quotes only the violent-felony definition that remains "in effect" today, *viz.*, the definition absent the residual clause. U.S. Br. at 4, 14.

atypical burglaries whenever the offense involves "some sort of sleeping area." U.S. Br. at 37. Pressing the point, the government harps on the fact that residential burglaries – even atypical ones – presumably present a greater risk of violence than do nonresidential ones, regardless whether they involve buildings or vehicles. U.S. Br. at 16, 17, 20, 21, 27, 37. But that fact – that degree of risk of violence – is irrelevant. In 1986, that fact would have simply made it all the clearer to Congress that its newly minted residual clause would reach those atypical residential burglaries. Thus, that fact is all the more reason to conclude that in 1986, Congress assumed burglary would continue to have its same generic meaning from 1984. Congress reasonably believed that its preexisting term "burglary" would reach typical burglaries of any building or structure, while its new residual clause would reach burglaries that were atypical yet "present[ed] a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii).

So when the government talks about the risk of violence associated with residential burglaries – or any burglary for that matter – it waives a red herring. In 1986, the residual clause handled that problem. It is only to compensate for the recent loss of the residual clause, *see Johnson v. United States*, 135 S. Ct. 2551 (2015), that the government now resorts to proposing a definition that is a hodgepodge of the views of the original three interpretative camps. According to the government, "burglary" should be a combination of the 1984 definition ("building), plus the common-law definition ("dwelling house"), but without the common law's nighttime requirement and without the common law's requirement that a "dwelling house" be a stationary structure, rather than something like a mobile "tent or booth." 4 William

Blackstone, Commentaries *226.[4] Congress did nothing so complicated. It left the outliers to the residual clause. Since that clause existed to reach irregular cases, the fact that atypical residential burglaries might be more dangerous than the typical burglary of a building is no reason to assume a broader definition for the enumerated offense "burglary."

II. The Risk of Violence in Burglaries, Even Residential Ones, Is Relatively Low, and When Violence Does Occur, It Usually Triggers a Separate Conviction for a Violent Crime.

The subtext of the government's brief – in repeatedly decrying the risk of violence in residential burglaries – is that if offenses like Tennessee aggravated burglary[5] are no longer classified as "violent felonies" (after the loss of the residual clause), then the ACCA will fail to reach inherently violent predicate offenses. The government hopes to use that "fact" to prompt the Court into rashly changing a statutory interpretation that has stood for nearly 30 years.

Not only does that argument lack relevance, *see* Section I, *supra*, but it lacks substance because burglaries,

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4. Blackstone's Commentary states: "Neither can burglary be committed in a tent or booth erected in a market or fair; though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices."

5. Tennessee ordinary burglary remains a "burglary" for ACCA purposes, notwithstanding the *Stitt* decision and the nullification of the residual clause. *United States v. Ferguson*, 868 F.3d 514, 515-16 (6th Cir. 2017).

even residential ones, are not inherently violent. In 2015, funded by a U.S. Department of Justice grant, a team led by Dr. Robert Culp reviewed historical data collected from 1998 through 2007 to determine whether burglary resulted in violence frequently enough that it should be classified as a violent crime. *See* Richard S. Culp et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007*, at 68 (2015) [hereinafter "Culp Report"], available at https://www.ncjrs.gov/pdffiles1/nig/grants/248651.pdf. The Culp Report says the "short" answer is "no." (Id. at 58.) Its reasons for so concluding are worth considering since the government harps on the perceived violence of burglary. The Culp Report makes three findings of special relevance.

First, data shows that burglary results in violence or threats of it "only rarely." *See also Tennessee v. Garner*, 471 U.S. 1, 21 (1985) (stating burglary "only rarely" involves violence since data showed it occurred in just 3.8% of burglaries). The Culp Report reviewed two sources that compiled data, as follows.

- *National Incident-Based Reporting System (NIBRS).* The NIBRS data set contains detailed information on crimes, including burglary, reported to the police. (Culp Report at 26.) According to that data, violence or threats of it accompanied only 0.9% of burglaries. (*Id.* at 31 & Table 3.) According to that same data, they accompanied only 1.2% of residential burglaries, and .17% of nonresidential ones. (*Id.* at 40.)

- *National Crime Victimization Survey (NCVS).* The U.S. Census Bureau surveys a nationally

> representative rotating sample of U.S. households gathering detailed information regarding crime, including burglaries. (Culp Report at 21.) According to the NCVS, between 2003 and 2007, residential burglaries resulted in violence or threats of it in 7.2% of the cases. (*Id.* at 22, 26.)

The Report explained the difference in these figures: since the NIBRS captured data only from jurisdictions with fewer than 250,000 residents, and since violent crime is less common in such jurisdictions, the NIBRS figure serves as a reliable "lower boundary" estimate, while the NCVS figure serves as a reliable "upper boundary" estimate. (Culp Report at 34.) The Culp Report also presented data showing that "violent residential burglary accounted for only .8% . . . of all burglaries that occurred over the study period," and that there was a decline from 1980 to 2011 in burglaries of "approximately 50% . . . in absolute terms and even more steeply per capita." (Culp Report at 7, 40.)

Those figures are comparatively low when viewed beside those for more typically violent offenses, particularly the figure estimating that violence or threats of it occur in residential burglaries in about 1 to 7 percent of the cases. Robbery or assault offenses will involve violence in virtually 100 percent of the cases. Indeed, in *Garner*, *supra*, this Court characterized a home burglary as "nonviolent" when statistics showed violence occurred in 3.8 percent of such burglaries. *Garner*, 471 U.S. at 10, 21. That characterization reflects common sense because a classification system *that is wrong approximately 95 percent of the time* must be deemed unacceptable in any field, not just in the one responsible for issuing mandatory

prison sentences. *Cf. Schlup v. Delo*, 513 U.S. 298 (1995) (discussing the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free") (internal quotation marks and citation omitted). "Considering that over 96.4% of all burglaries do not result in actual violence," it "appears overly punitive" to classify burglary as a violent crime. (Culp Report at xv.)

Second, the Culp Report explained that in practice "[w]hen burglary does co-occur with a violent crime, offenders are charged not only with the violent offense but also with burglary, or sometimes 'aggravated' burglary." (Culp Report at xii.) The Model Penal Code endorses this same practice. (*See* Culp Report at 2.) When an offender's prior burglary actually did trigger violence, his record will likely include a conviction for a violent offense, *e.g.*, robbery, that will be classified as a violent felony under the "force clause," *viz.*, 18 U.S.C. § 924(e)(2)(B)(i). Therefore, the classification of the actually violent burglary as "violent" due to it being a burglary tends to be superfluous. Worse yet, that independent classification of a burglary as violent can cause something akin to double-counting, as in *United States v. Schieman*, 894 F.2d 909 (7th Cir. 1990), where the defendant was previously convicted for burgling a building and also for assaulting the police officer who approached him three blocks away to investigate the burglary; that defendant received two ACCA strikes for violent offenses from this one burglary leading to an assault. "[T]o regard burglary as a violent crime – especially when separate charges for the violent acts are prosecuted in addition to the burglary charge – is to inflate the severity of the offense." (Culp Report at 58.)

Third, consistent with these two findings, a survey of "justice professionals and members of the public" shows they do not "rank burglary as a violent crime." (Culp Report at 15; *see also id.* at 17 ("All rank burglary at the low end of the felony severity scale, clearly as a crime against property.")). Unless the burglary actually gave rise to a violent crime, those surveyed considered it on a par with vehicle theft. (*Id.* at 15.) Tellingly, "[a]ll thirty-two states which divide their criminal codes into categories of crimes against persons, property, etc., classify burglary as a crime against property." (*Id.* at 3.)

The Culp Report shows that *Johnson* has not triggered a crisis with respect to burglary predicates because burglaries are only rarely violent, even when they involve dwellings. Indeed, partly due to the findings of the Culp Report, the U.S. Sentencing Commission has chosen to remove "burglary of a dwelling" from its list of "crimes of violence" for the career-offender statute. U.S.S.G. Appx Amend. 798 (Aug. 1, 2016) ("burglary offenses rarely result in physical violence"). Consequently, it is especially unwarranted for the government to now be asking this Court to redefine burglary to include burglaries of all dwellings, even the atypical ones formerly reached by the residual clause.[6]

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6. Even if an atypical burglary of a dwelling carries with it only a five percent risk of violence, it would be covered by the (former) residual clause because the term "serious potential risk of injury" demands a "degree of risk" of violence that is merely "roughly similar" to that of the enumerated offenses, like burglary. *Begay v. United States*, 553 U.S. 137, 143 (2008).

CONCLUSION

In *Taylor*, this Court correctly concluded that Congress intended the term "burglary" to reach only typical burglaries, *viz.*, those involving buildings or structures. As for atypical burglaries, such as those involving boats, vehicles, or tents, Congress expected the residual clause to reach them as long as they presented a roughly similar degree of risk. The fact that residential burglaries tend to present a greater risk of violence than nonresidential burglaries – even, presumably, when the residence is a boat, vehicle, or tent – only serves to confirm that Congress expected the residual clause to reach those offenses when atypical.

Moreover, the Culp Report shows that even residential burglaries result in violence only rarely, in as few as one percent of cases. As the Sentencing Commission has recognized, it is unfair to classify all residential burglaries as violent crime when so few of them are actually violent. The nullification of the residual clause has not created any crisis that remotely justifies this Court redefining what Congress meant by the word "burglary" in 1986.

Respectfully submitted,

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